SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1099

THE TRAILMOBILE COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT, AND AGRICULTURAL WORKERS OF AMERICA, U.A.W.-C.I.O., LOCAL No. 392, PETITIONERS,

vs.

LAWRENCE WHIRLS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Record from D. C. U. S., Southern District of Ohio	1	1
Reporter's transcript of oral proceedings	1	1
Plaintiff's Exhibit "A"—Plan of Liquidation	23	17
Plaintiff's Exhibit "B"—Bill of Sale	25	19
Plaintiff's Exhibit "C"—Union Contract	27	21
Plaintiff's Exhibit "D"—Union Contract	30	23
Defendant, The Trailmobile Company's Exhibit No. 1—Petition in Hess v. The Trailer Company of America	37	28
Defendant, The Trailmobile Company's Exhibit No. 2—Answer of The Trailer Company of America in Hess v. The Trailer Company of America	50	38
Defendant, The Trailmobile Company's Exhibit No. 3—Answer of UAW-CIO in Hess v. The Trailer Company of America	65	50

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 12, 1946.

3—4165

	Original	Print
Record from D. C. U. S., Southern District of Ohio—Continued		
Reporter's transcript of oral proceedings—Continued		
Defendant, The Trailmobile Company's Exhibit No. 4—Memorandum Opinion in Hess v. The Trailer Company of America	68	52
Defendant, The Trailmobile Company's Exhibit No. 5—The Judgment Entry in Hess v. The Trailer Company of America	68	52
Defendant, The Trailmobile Company's Exhibit No. 6—Decree and Entry of Affirmance	70	54
Defendant, The Trailmobile Company's Exhibit No. 7—Supreme Court Decision overruling motion to certify record in Hess v. The Trailer Company of America	72	55
Complaint	73	55
Intervening petition of UAW-CIO	78	59
Answer of The Trailmobile Company	79	60
Findings of fact and conclusions of law	84	
Judgment	89	67
Notice of appeal of defendant, UAW-CIO	90	67
Notice of appeal of defendant, The Trailmobile Company	91	68
Designation of record	92	68
Proceedings in U. S. C. C. A., Sixth Circuit	94	70
Minute entry of argument and submission	94	70
Judgment	94	70
Opinion, Martin, J.	95	70
Clerk's certificate (omitted in printing)	106	
Order Allowing Certiorari	107	81

[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

LAWRENCE WHIRLS, Plaintiff,

v.

THE TRAILMOBILE COMPANY, Defendant

Civil No. 1303

Transcript of Oral Proceedings

Filed January 24, 1946

Be It Remembered, that on Wednesday, November 28th, 1945, at 10 o'clock A. M., the above styled case came on for hearing before the Honorable John H. Druffel, Judge of the United States District Court for the Southern District of Ohio, Western Division. The following were the proceedings.

Appearances:

Byron B. Harlan, for the Plaintiff.
Philip J. Schneider, for the Defendant.
Sol Goodman, for the Intervening Petitioner.

The Court: I assume in view of the answer of the intervening petitioner here that their plea is generally res judicata, is that right?

[fol. 2] Mr. Goodman: Yes, Your Honor, and there is one plea in both our answer and Mr. Schneider's which is almost in the nature of a demurrer, that is, that we set up the fact that the plaintiff had his job for more than one year and no longer had any right or standing in Court.

The Court: Well now, what I am driving at is this: we are the midst of a trial here, but we want to try to dispose of this matter, and it seems to me that there are a number of things that can be agreed upon by stipulation here. Will it be stipulated by the parties that the pleadings in the State Court, together with the rulings of the State Court, be made a part of this record? That will save considerable time.

Mr. Schneider: We will so stipulate on behalf of The Trailmobile Company.

The Court: What's the next point?

Mr. Harlan: Your Honor, there is very little dispute as to the facts in this case. But there are some facts that are not included in the pleadings that substantiate facts that go to plaintiff's equities in this matter.

The Court: Will you make a brief statement?

Mr. Harlan: That's what counsel and I had tentatively agreed upon that statements would be made, and that wherever a disagreement occurs in those statements, then evidence could be introduced on those points. In this case, Your Honor, there was the Highland Body Company, a manufacturing company, operating in Cincinnati, as one corporation, a New Jersey corporation, I believe, and the Trailmobile Company, an Ohio corporation operating in another part of the City. The stockholders of the two companies were the same,—the officers of the two companies were the same. During the year 1943, gradually the officers moved the plant, the equipment and the supplies from the [fol. 3] Highland Body Manufacturing Company, over to the Trailmobile Company, and gradually transferred the employees of the Highland Body Manufacturing Company over to the Trailmobile Company, so that, by the end of that year, the equipment and the whole business was over at the Trailmobile Company and the personnel. On December 31 of that year, the Trailmobile Company entered into a contract with the Highland Body Manufacturing Company, whereby the Trailmobile Company took over the whole business. The Highland Body Manufacturing Company executed a bill of sale and there was a plan of consolidation or transfer executed at that time. At that time, the Trailmobile Company, in their plan of consolidation, agreed that they would assume all the debts and obligations, carry out and pay all debts and obligations of the Highland Body Manufacturing Company. During this year of turn over, a dispute arose between the employees of the two companies on the question of seniority. The evidence will show that in the preceding year of 1942, that is, the last full year of the Highland Body Manufacturing Company, they had slightly over 100 employees; that was during 1942. During that same year, the Trailmobile Company had slightly more than 1,000 employees. The ratio of the employees of the two companies was one to ten. The evidence would show

that during 1943, the Highland Body Manufacturing Company did a business in excess of one and a half million dollars, while the Trailmobile Company did a business of ten million dollars. In other words, the ratio of employees was as one to ten, whereas the ratio of the value of the work that they did was as one to eight. The Highland Body employees insisted that they should have on this consolidation and under the contract that was entered into between the officers of the two corporations, the same seniority [fol. 4] status, depending upon when they went to work, as the employees of the Trailmobile Company. The Trailmobile employees insisted that the Highland Body employees should be considered new employees at the Trailmobile Company. At that time, both of those companies were organized in the American Federation of Labor. This matter was submitted to the national organization of the American Federation of Labor, and that organization decided in favor of the Highland Body employees to the extent that the seniority of the employees should be just the same as though they were all under the same employer, which, as a matter of fact, they were, except for the fiction of the two corporations. Immediately the employees of the Trailmobile Company broke away from the American Federation of Labor and organized as a unit of the C. I. O. and had a vote of the joint employees. The Labor Board decided that the election should be as a unit, and naturally, the employees of the Trailmobile Company, out voted the employees of the Highland Body Manufacturing Company, and a contract was entered into whereby the employees of the Highland Body Manufacturing Company, in matters of seniority, were considered new employees and their seniority dated from January 1, 1944. This was litigated. A man by the name of Hess, I think his name was, representing the American Federation of Labor employees in the Highland Body Manufacturing Company, litigated the matter in the State Court, and contended that under the National Labor Relations Act, the bargaining agents of the two joint labor groups there, did not have the power to enter into a contract with the employer waiving the seniority rights of the Highland Body Manufacturing Company employees. The Court decided against them on that proposition. I might say that I find no place in the record [fol. 5] that this contract that was entered into between the Highland Body Manufacturing Company and the Trailmo-

bile Company, exclusively vested in the two companies, and the effect of that contract, that does not appear to have been discussed in either the Common Pleas Court or the Circuit Court; at least, they didn't mention it in their decisions. The Common Pleas Court decided that under the National Labor Relations Act, the bargaining agent could bargain as he pleased over questions of seniority, and therefore, dismissed the injunction suit. This went to the Court of Appeals and the Common Pleas Court was sustained and the Supreme Court refused to take it in. However, in the decision of the Common Pleas Court, that Court expressly said that this decision does not affect the rights of veterans under the Selective Service Act. So that, it will be our contention that that is not res judicata, as the Court expressly excepted the question that is before Your Honor this morning.

The Court: Now, of course, there's one point right here, —Lawrence Whirls. This concerns Lawrence Whirls.

Mr. Harlan: Yes, it concerns Lawrence Whirls; of course, the plea of res judicata does. I haven't gotten to that yet. May I say I will start right in on the point Your Honor makes. Lawrence Whirls entered the employ of the Highland Body Manufacturing Company in 1935,—one of the oldest employees out there. In 1942, he entered the military service; he came back in May of 1943. Now, Your Honor will recall that that was during the period in which the employees were moved over to the Trailmobile Company, when he re-entered the employment of the Highland Body Manufacturing Company, at his old seniority, which was accepted at that time as old seniority. In June of 1944, he entered and became a member of the C. I. O. union. [fol. 6] Based upon that entry, the defendants contend that he is therefore obligated by this bargaining contract, because he was a member of the C. I. O. union. In connection with that, the testimony will show that this is a closed shop operation. If one is not a member of the C. I. O. union, he can't have employment at all,—he loses both his seniority and his job. The defendants are now contending that if he joins the union, he has to give up his seniority, whether he is a veteran or not, because he is a member of the union. So that, anything such an employee does, whether veteran or not, he loses his seniority, according to the contention of the defendants here. The facts disclosed as to the equity of this matter are, that the employees of the Trailmobile

Company have appropriated to themselves this production of the Highland Body Manufacturing Company, which constituted one-eighth of their own production, and have added that one-eighth to the security of their own seniority. Of course, Your Honor understands that seniority means nothing or much, depending upon the backlog of employment; that's all it means. So, they have taken this backlog, that employment, which was one-eighth of the production that they had created, they have deprived the employees of the Highland Body Manufacturing Company, who created this employment, of this backlog, and taken it over for the employees of the Trailmobile Company,—they have deprived them of all rights in that as security for their own jobs. I will submit that under oath as the facts in the case, entirely aside from the stipulation. Now, the law we will take up afterwards.

The Court: That's what I want to get to. As I understand it, this case is in here by reason of the Selective Service Act, by which Congress gave protection to returning veterans. Now, that's the law by which we take jurisdiction.

[fol. 7] Mr. Harlan: I am just wondering whether we hadn't better have opposing counsel clear up any disagreement as to facts before we start in on any statement of the law.

The Court: Is there any disagreement on the facts, on the basic facts of this case up to this point?

Mr. Schneider: On the basic facts as raised by the issues in the pleadings, I don't think there is any disagreement there at all.

Mr. Harlan: I should like to have Mr. Goodman's statement.

Mr. Goodman: Mr. Harlan, in explaining to the Court about the decision by the A. F. of L. union, pointed out that it had decided seniority in favor of Highland.

The Court: Here's the point that the Court is concerned about now first, and that is, the jurisdictional question.

Mr. Goodman: All right. If it is jurisdiction, we can waive any additional facts right now if the Court wants to go into jurisdictional question. And since we raised that in our answer, of course, we allege a prior decision on the jurisdictional question.

The Court: You see, we are not trying the rights of all the veterans that were employed by the Highland Body

Company, as I see it. We have only one here. If we had more than one, then we might be concerned with the rights of each and every one. The point that stands out here now is the third defense of the Trailmobile Company that suit was filed more than one year after the re-employment.

Mr. Harlan: That's the whole case, as I see it. But I would like to get Mr. Goodman's statement in the record as to what facts I stated he disagrees with, not only for the benefit of Your Honor, but for the benefit of the record. That's what I would like to have before we discuss the law, if it is agreeable to the Court.

[fol. 8] The Court: As long as it doesn't take too long, what are the facts that you disagree with?

Mr. Goodman: As I started out saying, first, Mr. Harlan deals with what preceded while this union was an A. F. of L. union. He mis-states the facts, because the A. F. of L. Executive Board has ruled on the pairing of seniority first, and then on the date of hiring. It is not material at all in this case, but he has gone into the subject.

The Court: If it is not material, then we are not interested in it.

Mr. Goodman: Then he refers to the N. L. R. B. having decided on the Trailmobile and the Highland Body as one unit for the election. That is not correct. The N. L. R. B. had decided part of the Highland as a separate unit, part of Highland along with Trailmobile in the election unit. Mr. Harlan refers to the suit brought by Hess in the State Court. And that is incorrect, because the plaintiff in this case is specifically named as one of the parties in the Hess suit in the State Court, he having returned to employment at that time and being in the plant when the suit was brought, and having a direct knowledge that the suit was brought in his behalf, as well as in behalf of Hess for himself. Then reference was made to the fact that the State Court had no evidence of the bargaining contract between Highland and Trailmobile. Mr. Harlan is correct in stating that the opinion of the State Court makes no mention of it, but the record in the State Court contains that evidence. With those additions, we can go into the legal questions.

Mr. Harlan: I accept Mr. Goodman's corrections. If I stated that the Federation of Labor decided in favor of the seniority of the Highland employees, I merely meant that they decided the contention that the Highland employ-

[fol. 9] ces made at that time to the effect that they should take the same seniority status as the employees of the Trailmobile Company, depending upon their date of employment. And that's correct, is it not? I didn't intend to say that the Highland employees had superior seniority rights. I think I can concede everything else that Mr. Goodman says. Now, I neglected, Your Honor, to bring the books up that I intended to have here.

Mr. Goodman: May I say this,——

Mr. Harlan: I wanted to get the law here, Your Honor.

Mr. Goodman: Your Honor, I think that before the Court considers the argument on this statement of fact, there should also be in the record the fact that there are some 120 service men that had been employed at the Trailmobile, who have returned and are now again employed.

The Court: No, we are hearing the case of Lawrence Whirls.

Mr. Goodman: For this reason, Your Honor. We are contending that Lawrence Whirls' rights as a service man cannot interfere with the rights of other service men. In other words, the statute gives the rights to service men,—not just to Lawrence Whirls.

The Court: I know, but just so there is no mistake about it, the parties here now are Lawrence Whirls and the Trailmobile Company, with the C. I. O. intervening, and that's all, and the issue is between those parties. We have to confine it to the issue; that's all there is to that.

Mr. Goodman: If we are going to get a stipulation of fact, Your Honor, I will offer this, and the Court can decide later whether it applies or not,—that there are some 20 service men that formerly worked at the Highland Body Manufacturing Company, who have been given employment at Trailmobile, and that in point of time of Lawrence [fol. 10] Whirls or any others of the 20 former Highland employees, were given seniority as of their date of hiring at Highland, they would be placed ahead of a great number of former Trailmobile men who are returned service men. Now, with that additional fact, we can go to the law.

Mr. Harlan: I want to put the exhibits in now, Your Honor, but before putting the exhibits in, along the line of what Mr. Goodman has said, I might say that one of those service employees, a man by the name of Inskeep applied to the C. I. O. union for membership within the year that the contract provided. His application for membership was

refused, and he was discharged from the Trailmobile Company just as I said in my opening statement here was the condition. In other words, if they don't join the union,—and he couldn't get into the union,—they are discharged, and the defendant is saying that if they do join the union, they lose their seniority.

The Court: Well, of course, there are millions of returned service men. But we are confined to the issue here now. If we make up a record, we are going to make up a record between the parties here.

Mr. Harlan: I say that, Your Honor, just to call Your Honor's attention to the fact that it is not a theory I am stating to you,—it is an actual condition that occurs bearing on the equities of the case, and this is an application for an injunction and the Court will take into consideration the equities of the case.

Mr. Goodman: I must enter an objection to that, for when Inskeep returned, it was not a closed shop, and they could not have been dismissed whether they joined or not. Under their veterans rights, they were not subject to discharge for one year, except for cause.

The Court: All right. Now, let's proceed with the case of Lawrence Whirls.

[fol. 11] Mr. Schnieder: I haven't had a chance to say anything, but I think there is one additional fact or little series of facts that should be presented in connection with the Whirls case that has to do with the equities of the matter. The allegations of the petition say that at the time the suit was filed he had prior to that time been employed in the paint shop at a rate of approximately $1.05 an hour, and that at the time of filing the complaint he had been reduced to the stock room at some 83 cents an hour, due to January 1, 1944, seniority. Since the filing of the petition, the evidence will show that he has been transferred from the stock room to the body shop and is now being paid $1.12. In April, 1946, automatically he will get $1.18,—isn't that right? I will correct that, he is now getting $1.18, and in April he will automatically get $1.25, and that is a higher rate than any rate in the paint shop that he would be qualified to receive. I think that's material to the equities of the situation.

The Court: Well, it certainly is material, in view of the prayer of the complaint that they be restrained from reducing the pay.

Mr. Harlan: I might say that, of course, I drew this petition in the light of the facts existing at that time. I am not at present saying anything about rates of pay. Our whole case is this,—that if the quantity of work should suddenly drop, this man, who in the Highland Company has a seniority going back to 1935, would be one of the last if not about the last man to be discharged from there. But he would now be one of the first to be discharged. It is his seniority that we are complaining about at this time, not the pay, because all that has been changed since. But still the injunction should be granted so far as he is concerned. The fact that during this year, they have actually raised his wages, doesn't indicate that perhaps next week they might not reduce his wages.

[fol. 12] The Court: Here's the prayer,—"this plaintiff prays that defendant herein be temporarily restrained from reducing the pay of plaintiff below $1.05 per hour and from changing the seniority status of plaintiff to the control date of January 1, 1944, and that a mandatory injunction be directed to defendant herein requiring this defendant to reinstate plaintiff in his former position in the painting department." I assume Mr. Whirls himself wouldn't want that in view of the statement that he is now making $1.18. Now, could we at this time change the prayer, if you want to limit the question to this seniority right?

Mr. Harlan: I don't think it would be necessary to change the prayer, because we would have this statement of facts that have happened since the petition. But I am perfectly willing to have Your Honor pass upon the seniority rights alone at the present time. He has not suffered any hardship other than that.

The Court: All right; that brings us up to the point of law.

Mr. Harlan: Well, it brings us up to the exhibits; I want to get them in. I am offering in evidence the plan of liquidation whereby the Trailmobile Company assumed the debts, liabilities and obligations of the Highland Body Company.

And said paper so offered in evidence is made part of this record as Plaintiff's Exhibit A.

Mr. Harlan: Then I am offering the bill of sale.

And said paper so offered in evidence is made part of this record as Plaintiff's Exhibit B.

The Court: That's all stipulated. Those will all be part of the record any way. It is not necessary to put them in now. We agreed that all those matters will be made a part of the record without you putting them in now.

[fol. 13] Mr. Harlan: I don't know how we can get them into the record without putting them into it, in open Court.

Mr. Goodman: Mr. Harlan, as I understand it, we are going to stipulate these exhibits, along with the record in the State case, into the record as part of your case.

Mr. Harlan: Let me state them into the record at this time,—that there will be introduced into the record, a copy of the employer-employee agreement of employment of 1940-1942, to cover the date when Mr. Whirls left the employment of the Highland Body Manufacturing Company.

And said pamphlet so offered in evidence, is made a part of this record, as Plaintiff's Exhibit C.

Mr. Harlan: There will also be introduced into the record a copy of the agreement of 1945, entered into between the bargaining agents of both of these unions and the Trailmobile Company, whereby the seniority was put forward for the Highland Body employees to January 1, 1944.

The Court: Let them all be accepted and made parts of the record.

And said paper so offered in evidence is made part of this record as Plaintiff's Exhibit D.

The Court: Now, I think what we are interested in mainly here is the third defense: "That plaintiff returned to work after being discharged from the military service of the United States on May 3, 1943, and that this action was not filed in the United States District Court or any other Court until September 18, 1945, more than one year after the re-employment of defendant herein, and that plaintiff has not been deprived of any rights granted by Section 308, Title 50 of the laws adopted by the Congress." [fol. 14] Now, he is claiming his rights here under Section 308, Title 50.

Mr. Harlan: If Your Honor could get before you while this is being discussed, a copy of the Code, Section 308, I think it would be helpful. It is Title 50, Appendix Section.

The Court: What volume does it start with?

Mr. Harlan: 50, War,—50 Appendix. Now, Your Honor, the basis of this question rests in a joint resolution of Congress passed in August, 1940. That resolution, so far as it referred to the re-employment of veterans, was the same as the existing law, except as to sub-paragraph c of main paragraph C,—no, it is sub-paragraph c of section 3. If Your Honor has 308 there, over on page 31, you will find a small letter c paragraph about the middle of the page under big letter C toward the top of the page. I am afraid Your Honor is looking at the second paragraph c toward the bottom of page 31,—if you will look at the paragraph c that's under those three letters A, B and C,——

The Court: Now, what do you want me to look at?

Mr. Harlan: About half way down page 31, you will see a small c paragraph; that's the thing. Now, when the joint resolution was originally passed in August, of 1940, the re-employment provisions, were substantially if not exactly the same,—at least the only changes that I am going to call Your Honor's attention to,—are in small, paragraph c up here. Now, paragraph c, as originally passed read as follows: "Any person who is restored to a position in accordance with the provisions of paragraph A or B of sub-section b,"—now, there has been a lot inserted, but as originally passed, "shall be so restored without loss of seniority, insurance participation or benefit or other benefit, and such person shall not be discharged." Now, the last clause is just the same as it is [fol. 15] here,—"and shall not be discharged from such position without cause within one year after such restoration." Now, that joint resolution was subsequently, in October, I believe of that year, passed as a law, and the amendments were put in it as found now in the paragraph c that you are reading. And that was again passed as a law, I think, in 1943.

The Court: Well, this section is the law to-day?

Mr. Harlan: This section is the law to-day. But I am using that to bring out my point that that's one of the limitations,—if it were not for this clause in here, "and shall not be discharged from such position without cause within one year," then we would have no law suit. The whole question that is before Your Honor is, does that phrase, in which it says "and shall not be discharged," apply to his seniority benefits, his insurance benefits, his right to vacations and all the other benefits, and it is my

contention that that "shall not be discharged . . . within one year," simply applies to that clause, and does not apply at all to his seniority rights.

The Court: Well, now, hold up for just a minute and see if we can't get an agreement to this. As I take it now, it is the defense of the C. I. O. and the Trailmobile that it was the intention of Congress to protect this man only for one year after employment.

Mr. Schneider: After employment, and the defense here is, that after a year, they are out on their own. In other words, seniority is the thing itself, the security, which a man has in his job during this year, and, so long as he does his work, he can't have any higher seniority than Mr. Whirls has in his job. And, our contention is that this seniority was granted for one year.

[fol. 16] The Court: I wonder if we can't narrow the issues to the point that the contention of the government is, that the returned veteran, when he returns, shall be immediately restored to his seniority, and that that right of seniority is to be continued up until to-day.

Mr. Harlan: That's my contention.

The Court: That's your contention, and will continue until Congress changes the law. Now, it is the position of the Trailmobile and the C. I. O. that that protection is only for a year, and, after the end of the year, that he loses that right to seniority, and he then becomes bound by the decision of the State Court in that other litigation. Is that your position?

Mr. Schneider; No, Your Honor, I wouldn't put it just that way. As I see the case; there are two separate defenses. One is that the State Court determined the corporate status of those two corporations; therefore, that this man is bound under Erie Railroad against Thompkins by the decision of the State Court, and his position is no better than any other employee involved in that litigation. The second is, that notwithstanding the decision of the Ohio Supreme Court and notwithstanding the corporate status of those two corporations, nevertheless he came back and was employed, and he was employed for a year and more than a year, and having been employed that year as a member of the union, with all the rights of employees, his seniority went with the majority union as

the collective bargaining agent of the whole, and it expired as of that time.

The Court: That's what I am talking about. It is your position that having been restored to the employment that he had before he went into the service, that the protection of the Act of Congress only extended to that one year.

[fol. 17] Mr. Schneider: That's right.

The Court: That having joined the C. I. O., and being made a part of this litigation, that he waived any rights that he had. Your position is that it was the intention to protect him for a year and that Congress was no longer interested in the veteran.

Mr. Goodman: Now, we have additionally, that this Court ordinarily would not have jurisdiction in this type of suit between an individual and his employer.

The Court: The only jurisdictional rights that we have, come in under Section 308.

Mr. Goodman: That's what I wanted to point out. That Section gives this Court jurisdiction, and if Lawrence Whirls claims that his rights were interfered with under that Section, Congress fixes the time within which he could complain as one year. If within that year he claims his seniority rights were being taken away from him, he was given the right to go into the Federal Court.

The Court: Now, since we have that, will it be stipulated by the parties that by reason of the Hess litigation, that Lawrence Whirls doesn't have the seniority position that he would have had before? Will it be stipulated that his present situation in Trailmobile is not what it was when he returned from the service? That makes a clear cut issue.

Mr. Goodman: We can't stipulate that.

The Court: That's a fact, though, isn't it?

Mr. Goodman: No; I want to point out what we can agree to, with which I think Your Honor will agree, and that is this; the dates are in the record as to when Whirls was employed by Highland,—when he went into the service,—when he returned in 1943 and went back to Highland,—when Trailmobile purchased or bought out Highland, [fol. 18] and the seniority that was given to him in Trailmobile as of January 1, 1944. All those are in the record and we agree with them, but we don't agree with that pos-

sible conclusion that he has been deprived of any rights by reason of——

The Court: I am not asking you to agree that he has been deprived of anything. I just want what the facts are. As I understand it, you went along with Mr. Harlan. The employees from Highland Body Manufacturing Company, so far as seniority is concerned, are subordinated to the Trailmobile?

Mr. Goodman: No, that is not true. The contract was made in 1945. It started in 1944 and was signed and approved in June of 1944. Highland employees were given seniority as of January 1, 1944, and it put them ahead of many Trailmobile employees and behind others, because they didn't get the same dates as the dates of hiring in Highland.

The Court: They didn't get the assignment of the same dates as the dates of hiring in Trailmobile?

Mr. Goodman: As they had in Highland; that affected a large number,—there were several hundred of them.

The Court: The point now is,—will it be stipulated to this extent, that Whirls' present status is not equal to that of the employees of Trailmobile who were employed by Trailmobile as of the same dates that he was employed by Highland?

Mr. Goodman: Well, that's true as a conclusion. It also is part of our contention that Whirls and all other Highland employees became employees of Trailmobile on January 1, 1944.

The Court: He went to work for Highland in 1935, but his present seniority status is as of January 1, 1944?

[fol. 19] Mr. Schneider: That's right; I think Your Honor has that now.

The Court: That's what I say. It is Mr. Harlan's contention, as I understand it, that Whirls, by reason of Section 308, is entitled to a seniority status as of 1935, when he went to work for Highland,—is that right?

Mr. Harlan: Yes, Your Honor, but our contention is that when he went into the Army, he had a priority dating from 1935, and since the contract that was entered into in June of 1944, which is involved in this case, it is claimed that he has only a seniority dating from January 1, 1944: in other words, he has lost five years seniority.

The Court: Now, we have got down to the issue.

Mr. Harlan: Now, the question, as I said a moment ago, that is before this Court is,—does that clause that says that he shall not be discharged from such position without cause for one year after such restoration, control the whole of the rest of the Act? That's the whole question. And, it is our contention, Your Honor, that this re-employment provision in the Selective Service Act had two definite purposes, and those purposes are shown more clearly in the original joint resolution because they are more direct, than in paragraph c that I have just read to you, wherein it says that he shall get his seniority rights and his insurance benefits, and he shall not be deprived within one year.

The Court: Now then, we don't want to lose sight of what we have accomplished here. The record is made up and all these exhibits are in agreement on the facts. So, the question now is, should the Trailmobile Company be mandatorily enjoined to restore Lawrence Whirls to the seniority status of 1935 on an equal basis with Trailmobile employees who were employed in 1935? Is that right?

[fol. 20] Mr. Harlan: That's right, Your Honor, that's the question.

Mr. Schneider: Can Your Honor date it over and let each side furnish a brief?

Mr. Harlan: I am in complete accord with Your Honor, I think I can get my brief in to-day.

The Court: If I were you, I would take a week. Now that we have the issues narrowed, is that agreed?—that the issues are narrowed to that one issue?

Mr. Harlan: Of course, they still maintain their defense of res judicata.

The Court: I am not so concerned about the issue of res judicata as I am about just what was intended by Section 308,—whether Section 308 intended that when this man came back after entering the service, his seniority status was established regardless of the year or not.

Mr. Schneider: Your Honor doesn't care for a brief on the other two points?

The Court: I think that's very important, as it appears this case is not going to end here,—that is it will go to the Court of Appeals. So, in looking toward the Court of Appeals to convince them I would have a full brief from the parties here. If you can get it in to-day, all right. But

we are engaged in trials here every day, and I would think it would take a week to give us a full brief. It has been hanging here, let's see, it was filed September 18th, but we will crowd it along just as fast as we can.

Mr. Goodman: It is agreed, of course, that we will supply to the record the evidence that we have referred to on res judicata.

The Court: You can make up that record right away.

Mr. Harlan: Entirely aside from how soon my brief is supplied, how soon would Your Honor expect a brief from the defendants?

[fol. 21] The Court: Well, say the third day after. Will that be sufficient? Then we will have all the briefs within ten days, no longer, and I will promise you a prompt decision.

Mr. Harlan: It is simply a question of statutory interpretation.

The Court: And I will promise you it will be promptly decided on that phase.

Mr. Schneider: We will offer in evidence on behalf of the Trailmobile Company, the petition in Louis J. Hess v. The Trailer Company. (Defendant's Exhibit 1.)

The answer of the Trailmobile Company in the Louis J. Hess case. (Defendant's Exhibit 2.)

The answer of the C. I. O. in the Louis J. Hess case. (Defendant's Exhibit 3.)

The memorandum opinion of the Court of Common Pleas. (Defendant's Exhibit 4.)

The judgment entry in the Court of Common Pleas. (Defendant's Exhibit 5.)

The decree and entry of affirmance in the Court of Appeals. (Defendant's Exhibit 6.)

October 15, 1945 issue of the Ohio Law Reporter, volume 31, page 51, which shows case number 30392 on the docket of the Supreme Court of Ohio, Louis J. Hess, Appellant, v. The Trailer Company of America et al., Appellees, motion to certify record overruled. (Defendant's Exhibit 7.)

And said papers and pamphlet so offered in evidence, are made parts of this record as Defendant's Exhibits 1 to 7, both numbers inclusive.

And, we will proffer page 61 of the record in the Louis J. Hess case:

Q. Mr. Calhoun, following the dissolution of the Highland plant as of January 1, 1944, the Trailer Company took over [fol. 22] all of the assets as well as the obligations of what was formerly the Highland plant?

A. That's correct.

Q. I believe Mr. Weintraub asked you yesterday any contracts that might have been outstanding in the name of the Highland Body Plant, the Trailer Company is now completing them, is that true?

A. That's correct.

Mr. Harlan: I wish to state that I object to the inclusion of that part of the testimony in the record because the question of res judicata is determined by the issues set forth in the pleadings and by the issues decided by the judgment entry, and not by a miscellaneous portion of the testimony that may or may not have been considered by the Court.

I, Paul Wisenall, Court Reporter, United States District Court for the Southern District of Ohio, Western Division, do hereby certify that the above and foregoing is a true, accurate and complete transcript of the proceedings in the above entitled case, as reported by me in shorthand and transcribed from my notes.

Given under my hand this 24th day of January, 1946.

(S.) Paul Wisenall, Court Reporter, United States District Court, Southern District of Ohio, Western Division.

[fol. 23] PLAINTIFF'S EXHIBIT "A"

Plan of Liquidation

(1) As of the close of business December 31, 1943, the President and Secretary or Assistant Secretary of The Trailer Company of America shall, pursuant to Section 8623-79 of the General Code of Ohio, consent in writing to the dissolution of The Highland Body Manufacturing Company in the name of and on behalf of The Trailer Company of America as the owner of all the outstanding stock of The Highland Body Manufacturing Company, and The

Highland Body Manufacturing Company shall thereupon cease all operations and exist thereafter solely for the purpose of winding up its affairs in accordance with this Plan of Liquidation.

(2) Upon the execution of such written consent to dissolution of The Highland Body Manufacturing Company and as of the close of business December 31, 1943, the President and Secretary or Assistant Secretary of The Highland Body Manufacturing Company shall execute and in due course file with the Secretary of State of Ohio an appropriate Certificate of Dissolution, pursuant to such unanimous consent of all shareholders, and the proper officers of The Highland Body Manufacturing Company shall in due course obtain, execute and file with the proper authorities of the State of Ohio appropriate receipts, certificates, affidavits, tax returns and reports and other appropriate instruments, shall publish and mail the notices required by law and shall do all acts and execute and deliver all papers that may be required fully and finally to dissolve The Highland Body Manufacturing Company.

(3) As of the close of business December 31, 1943, the President or Treasurer of The Highland Body Manufactur- [fol. 24] ing Company shall transfer, assign and deliver all the assets, property, and business, including all tangible and intangible property, patents, rights, licenses, trade names, trademarks, and good will, and generally all assets of every character to The Trailer Company of America, and The Trailer Company of America shall assume and pay all debts, liabilities and obligations of The Highland Body Manufacturing Company, and shall assume and perform all outstanding contracts of The Highland Body Manufacturing Company, and The Trailer Company of America shall upon such distribution of the assets of The Highland Body Manufacturing Company surrender all the outstanding shares of Capital Stock of The Highland Body Manufacturing Company to the President or Treasurer of that company, and said certificates and shares shall be cancelled.

(4) The President or Treasurer of The Highland Body Manufacturing Company shall promptly do and perform all acts necessary or appropriate to the full and complete winding up, liquidation and dissolution of The Highland Body Manufacturing Company, and the proper officers of

The Trailer Company of America shall make a permanent record of this resolution and this Plan of Liquidation and shall in due course file with the corporate federal tax returns a complete statement of all facts pertaining to this complete liquidation, including an appropriate statement showing in detail all transactions incident to or pursuant to this Plan of Liquidation, including also a list of all the properties received upon the distribution, showing the cost or other basis of such properties to The Highland Body Manufacturing Company at the date of distribution and the fair market value of such properties on the date distributed, and including also the statement as to ownership of the shares of stock of The Highland Body Manufacturing Company, showing the number of outstanding shares, per- [fol. 25] centage owned, and voting power of each share; as of the date of adoption of this Plan of Liquidation and as of all times thereafter up to and including the date of adoption and liquidation, and also showing the cost or other basis of the Capital Stock of The Highland Body Manufacturing Company and the proper officers of The Trailer Company of America shall also keep such records and file such additional instruments, lists, statements and other information as may be required by the Commissioner of Internal Revenue.

PLAINTIFF'S EXHIBIT "B"

Bill of Sale

Know All Men by These Presents: That, Whereas, The Highland Body Manufacturing Company, an Ohio corporation, is being completely liquidated and dissolved pursuant to a Plan of Liquidation adopted by The Trailer Company of America, a Delaware corporation, and The Highland Body Manufacturing Company.

Now, Therefore, pursuant to and in consideration of said Plan of Liquidation, The Highland Body Manufacturing Company does hereby sell, assign, and transfer, convey, and deliver unto The Trailer Company of America, its successors and assigns, the following personal property, namely:

All the personal property of any and every kind and nature, tangible and intangible, belonging to or in the pos-

session or control of The Highland Body Manufacturing Company, including, but without limitation, all engines, boilers, machines, and machinery, tools, implements, appliances, apparatus, equipment, tracks, furniture and fixtures, jigs, dies, patterns, drawings, patents, patent rights, trade marks, trade names, licenses, contracts, notes, accounts [fol. 26] and bills receivable, cash on hand in bank, raw materials, materials in process of manufacture, manufactured products, supplies, claims, actions, demands, and rights of action, and all property and rights of any and every description, and business and good will of The Highland Body Manufacturing Company;

To Have and to Hold the same unto The Trailer Company of America, its successors and assigns, absolutely forever, and The Trailer Company of America by acceptance hereof assumes and agrees to pay all liabilities and obligations to perform all contracts of The Highland Body Manufacturing Company.

And The Highland Body Manufacturing Company warrants that it is the lawful owner of all the above property and has full right to sell and transfer the same, that it will warrant and defend the same against all claims and demands whatsoever, and that it will execute and deliver any and all further instruments that may be required fully and completely to transfer all the right, title, and interest of The Highland Body Manufacturing Company in all its property of every character to The Trailer Company of America.

In Witness Whereof, The Highland Body Manufacturing Company has caused its separate name to be hereunto subscribed and its seal to be hereunto affixed by its President thereunto duly authorized by its Board of Directors and all its stockholders this 31st day of December, 1943.

The Highland Body Manufacturing Company, by David R. Calhoun, Jr., President.

Attest: ——, Assistant Secretary.

[fol. 27] State of Ohio,
County of Hamilton, ss:

I, ——, a Notary Public in and for said county and state, do hereby certify that David R. Calhoun, Jr., President of The Highland Body Manufacturing Company, this day acknowledged and declared that he executed the fore-

going Bill of Sale in the name and on behalf of The Highland Body Manufacturing Company, as the free and voluntary act and deed of said corporation, and his free and voluntary act and deed on behalf of said corporation.

Witness my hand and notarial seal this 31st day of December, 1943.

—— ——; Notary Public.

PLAINTIFF'S EXHIBIT "C"

Article 13

All employees of Highland Body Manufacturing Company and The Trailer Company of America, when not working at their respective plants, shall be given preference over all new applicants for jobs in the event either plant is hiring new men. New applicants shall only be given jobs in the event all unemployed men of either of the above plants are offered employment, so far as is consistent to perform the services required. Employees so transferred from one plant to another when called back to the [fol. 28] plant at which they hold seniority, may return as soon as arrangements can be made to replace them without disturbing the operations at either plant, provided, however, that such period does not exceed three (3) days. However, employees at either plant can remove probationary employees when the work is over five (5) days.

Article 14

Section 1. The Departments of Highland Body Manufacturing Company shall be Mill, Light Metal, Heavy Metal, Trim and Cab, Paint, Body, Welders, Yard or (Clean Up) and Miscellaneous, including shippers' helpers, watchmen, licensed firemen, maintenance, stock-keepers and order and receiving clerk.

The Departments of The Trailer Company of America shall be Lay-Out Department, Machine Shop, Riveting Department, Assembly Department, Welding Department, Paint Department, Light Metal, Body Shop and Miscellaneous. (Miscellaneous includes all non-productive labor.) A regular Repair Crew shall be established to consist of the following men: Riveter, Body Builder and Assembler.

Sec. 2. Seniority shall be determined from the last date of hiring. Seniority shall be departmental. Day and night shifts shall be considered one Department, with Departmental seniority ruling throughout entire Department.

Sec. 3. When a reduction in personnel becomes necessary in any department, senior employees in that department shall be retained and no employee shall be required to submit to any reduction in wages, regardless of the operation he is required to perform within his respective departments.

[fol. 29] Sec. 4. All transfers shall be temporary unless otherwise agreed upon by the Management and the Shop Committee.

Sec. 5. Any employee who is to be laid off in his department due to slackening of work shall be given temporary transfer to any department where work is available, unless it is mutually agreed he cannot do the work, retaining his seniority in his own department. He or any other employees of his department so transferred to another department temporarily will retain their departmental seniority among themselves, in the department to which transfer is made, in case of further reduction in personnel or return to their original department.

But any or all employees transferred temporarily shall become the junior to all employees in the department to which transfer is made. Wage rate of employees transferred temporarily to be subject to Article 18, Section 1. When work picks up in the department from which employees were transferred, they shall be returned to their own department according to seniority.

Sec. 6. Any employee may transfer permanently to another department but will become the junior to all employees on the seniority list in the department to which transfer is made. If the transfer is to be permanent the employee shall be given thirty (30) days probation in the new department at his old rate of pay, and if he proves to the satisfaction of the Management and Shop Committee that he can handle the operation, he will then receive the rate of pay of that operation. If the employee is found to be incapable of holding the new job by the Management and Shop Committee at the end of the thirty (30) day probation period, the employee shall be returned to the job

from which he was transferred without loss of seniority in the department from which transfer was made.
[fol. 30] Men making dies, jigs and other special work, requiring special knowledge and experience, may be designated by the Management and Shop Committee without regard to their seniority.

Sec. 7. All transfers from one department to another can become effective only after all employees in line in the department to which such transfers are to be made are called and given opportunity to fill openings.

Sec. 8. Members of Shop Committee shall head the seniority list of their respective departments and at expiration of such term of office shall be returned to their regular place on seniority list.

Article 18

Sec. 2-A. In case of a national crisis, such as a declared or undeclared war, any man who relinquishes his job with the Company for services rendered to the Government, shall on his return to work retain his place on the seniority list with accumulation.

Plaintiff's Exhibit "D"

Article II

Recognition

Section 1. The Company recognizes the Union as the exclusive bargaining agent for all its production and maintenance employees, excluding office and plant clerical employees, technical employees, timekeepers, armed guards, kitchen and cafeteria help, Cab and Mill Departments, superintendents, assistant superintendents, general foremen, foremen, and other supervisory employees with the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, in all those matters specifically [fol. 31] provided for herein pertaining to wages, hours, and working conditions.

Article VIII

Seniority

Section 1. Seniority, as interpreted in this article, shall be on a plantwide and departmental basis, and shall mean an employee's length of service with the Company. In all cases of increase or decrease of the working force, the principles of seniority as herein set forth shall govern.

Section 2. New employees and others hired after a break in continuity of service will be considered probationary employees until they have worked for the Company 90 days. During this period the Company may transfer, layoff or discharge such probationary employees as it finds necessary and such action shall not constitute a grievance against the Company.

After the 90 day period the employee shall be entered on the seniority list as of his date of employment. All employees of both the day and night shifts shall be entered on the same seniority list.

Section 3. Shift preference shall be on the basis of seniority within the respective departments provided, however, in the opinion of the Company and the Union this preference does not interfere with production.

Section 4. It is understood and agreed that in all cases of increases or decreases of the working force, promotions, transfers, and in the reorganization or consolidation of departments made necessary through changes in manufacturing, seniority shall be given preference by the Company when the occupational qualifications and experience of two or more employees are relatively equal.

Section 5. Employees transferred from one department to another shall hold seniority in the department from [fol. 32] which transferred for a period of thirty (30) working days, after which time all their seniority will accumulate in the new department.

Senior employees, however, who are serving their thirty (30) day period in a department affected by a layoff, shall be laid off only if their accumulated seniority does not entitle them to continue working.

For purposes of seniority the following shall be recognized as departments:

(1) Layout
(2) Machining Department
(3) Axle Department—Sub-Tire
(4) Chassis Assembly
(5) Painting
(6) Light Metal
(7) Body Assembly
(8) Inspection
(9) Maintenance—Sub. Plant House
(10) Stock (Rec. & Truck Drivers)
(11) Service Parts
(12) Welding
(13) Riveting
(14) Shipping
(15) Export Parts

Define Sub Departments: Employees listed under the sub departments will be represented by the representatives of their original departments but will be carried on separate seniority lists.

Section 6. The Company shall furnish the Union with departmental and plantwide seniority lists as soon as possible but no later than thirty (30) days after the signing of this agreement and shall have copies posted on the bulletin boards. Any protests by the Union or any of its members must be filed within fourteen (14) working days after the date of posting or receiving of the lists. In the event that such protests are not filed within this specified time, the seniority lists shall be final. Every six (6) months thereafter, the Company shall prepare revised lists for the Union representatives and they shall be advised weekly of seniority list changes by departments.

[fol. 33] Section 7. When there is a curtailment of work:

(a) Probationary employees shall be the first to be laid off.

(b) The youngest employees in the department or departments affected will be laid off or transferred depending upon their seniority. If they are older that the yougest empolyees in the plant, these youngest plant employees will be laid off and replaced by the employees transferred from the department or departments affected by the curtailment. The oldest employees transferred will have the right to select their jobs from among the vacancies, consistent with their qualifications to perform the work. If any em-

ployee chooses to take a layoff in preference to a transfer, he may do so without affecting his seniority standing in his department.

(c) The Company will consider a reduction to forty (40) hours per week to avoid a general layoff as conditions at the time may warrant. The Shop Committee shall be called in to discuss the reasons before any layoff.

Section 8. When there is an increase of the working force after a layoff:

(a) The reverse of the layoff procedure shall be followed.

(b) Notification of return shall be by registered letter to the last known address of the employee.

Section 9. Employees required for performing the operations of making tools, dies, fixtures, jigs, for taking inventory or for other work of special nature, requiring special knowledge, skill or experience may be selected without regard to seniority or effect upon their seniority.
[fol. 34] In case of overtime work (except inventory) in their regular departments, these employees will not be eligible to exercise their seniority for such overtime work unless they are permanently transferred back to their former department.

Section 10. Employees who have been laid off or whom the Company has failed to recall after a layoff in violation of the seniority provision herein, shall be paid for all time lost.

Section 11. Committeemen and Chief Stewards shall have preference of employment on their respective shifts and in their respective departments during their term of office.

In case a Committeeman or Chief Steward is unable to fulfill a job requirement on overtime work, the oldest capable employee in his department will be used.

Section 12. An employee's seniority shall terminate for the following reasons:

(a) If he quits.

(b) If he is discharged for proper causes.

(c) If he fails to report on schedule following a vacation or an authorized leave of absence without giving satisfactory explanation.

(d) If he engages in gainful employment during a leave of absence, except where such leave of absence has been expressly granted for that purpose.

(e) If he obtains a leave of absence under false pretenses.

(f) If after a layoff he fails to report for work within three (3) working days after his recall (exclusive of Saturdays, Sundays and Holidays). In this event he shall have no recourse if the next man on the seniority list is called, but will be eligible for [fol. 35] next call on seniority list if he has a justifiable excuse for not reporting.

(g) If he is absent for three (3) working days without notifying the Personnel Department or his Foreman.

Article IX

Military Service

Section 1. Employees entering a military, naval or other combat service, or conscripted by the United States in time of war will be considered on a leave of absence and will maintain and accumulate all seniority rights without interruption. Such employees who request reemployment within ninety (90) days after honorable discharge from said service shall be reinstated to the position held by him before entering said service at the current rate of his classification of work; provided, however, that he is physically and mentally able to perform the work satisfactorily. If the position of such an employee has been eliminated, the Company will exert every reasonable effort to provide for the employee employment for which he can satisfactorily qualify.

Section 2. An employee who is or has been inducted into the active service or who in time of war volunteers for the

armed forces and is accepted shall, upon taking leave of absence for such service, receive vacation pay as follows: (1) A full vacation based on average earnings for the previous 12 month period for employees who:

(a) were entitled to and received vacation pay the previous year, and left for military service after January 1 of the current year:

(b) were in the employ of the Company prior to July 1 of the previous year, but were not then entitled [fol. 36] to vacation pay and who did not enter military service until after January 1 of the current year;

(c) have been in the employ of the Company for 12 months immediately prior to entering military service.

(2) A partial week's pay based on the number of months employed by the Company for employees who:

(a) were employed before July 1 of the preceding year, but who did not complete a full year with the Company and who entered military service prior to January 1 of the current year;

(b) were employed between July 1st and October 1 of the preceding year and who entered military service after January 1 of the current year.

[fol. 37] DEFENDANT'S EXHIBIT 1

COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

Case No. A-88735

LOUIS J. HESS, Individually, and as an Employee of The Trailer Company of America, a Corporation, for Himself and for All Other Persons Similarly Situated, 5502 Stewart Avenue, Cincinnati, Ohio, Plaintiff,

v.

THE TRAILER COMPANY OF AMERICA, a Corporation, et al., Defendants

PETITION—Filed 7/17/1944

1. The plaintiff, Louis J. Hess, is an *an* employee of the Trailer Company of America, a corporation, defendant herein, and he brings this action upon his own behalf and

upon behalf of 178 other employees similarly situated (104 of said number now being actually working for said defendant company and the other 74 of said number being employees of the defendant company, but now in the armed forces and services of this Country), the questions and matters to be adjudged and determined being of a common and general interest to him and to all such other employees similarly situated, it being impracticable for them all to be brought before this court as plaintiffs and that [fol. 38] the filing of this action for himself and said other 178 employees similarly situated will avoid a multiplicity of suits. This plaintiff and the other said employees similarly situated will hereinafter be referred to as "plaintiff employees."

2. The defendant, The Trailer Company of America, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and is engaged in business at 81st & Robertson Road, Oakley, Cincinnati, Ohio, manufacturing and assembling automobile trailers, drags and kindred mobile units, all of which are being used in the present War effort and are urgently and vitally needed now in order to insure Victory and a successful conclusion of the present War; that said The Trailer Company of America has in its employ approximately 1900 production workers, among them being these plaintiff employees and some other 500 persons now in the armed forces and services of this Country. This defendant is referred to as 'employer' in the contract hereinafter referred to, but in this pleading will hereinafter be referred to as "defendant company."

3. The defendant, International Union, United Automobile, Aircraft & Agricultural Implement Workers, CIO, Local Union #392, is a voluntary unincorporated association consisting of certain employees of the defendant company, but not including these plaintiff employees and other employees not members of said Union and those employees now in the armed forces and services of this Country; that, by virtue of certification by the National Labor Relations Board said Union is the bargaining agent for all the employees of the defendant company except, the employees of the cab and woodworking departments and other employees not material to the determination of this

[fol. 39] cause, and as such did enter into a written contract with the defendant company on June 21st, 1944, which contract covered, among other things, the seniority and terms and conditions of employment of all said employees, including these plaintiff employees, who are within the said bargaining unit so contracted for; that a copy of said contract is hereto attached, made a part hereof the same as if fully re-written herein at length, and marked "Exhibit 'C' "; that Chester Nichols, defendant, is president of the said International Union, United Automobile, Aircraft & Agricultural Workers, CIO, Local Union #392, and as such exercises all the rights, powers and duties of said office; that Willard Schmidt, defendant, is secretary of said International Union, United Automobile, Aircraft & Agricultural Workers, CIO, Local Union #392, and as such exercises all the rights, powers and duties of said office; that George Schneider, defendant, is Chairman of the bargaining committee of said International Union, United Automobile, Aircraft & Agricultural Implement Workers, CIO, Local Union #392, and as such exercises all the rights, powers and duties of said Committee, which has for its functions, among other things, the negotiating of contracts and agreements and the presentation and settlement of grievances. These defendants will all hereinafter be referred to as "defendants UAW-CIO";

4. Plaintiff employees are not members of defendant UAW-CIO Union, but are members of the International Union, United Automobile Workers of America, Affiliated with the American Federation of Labor, Local Union #131; under the contract above referred to they are not required to be, nor are they, members of said defendant UAW-CIO union. This Local Union #131 will hereinafter be referred to as "UAW-AFL";

[fol. 40] 5. Plaintiff employees state that among the terms and conditions of said contract are provisions protecting and guaranteeing the seniority rights of each employee and particularly Section 4, Article VIII, which has been in full force and effect ever since June 21st, 1944, and is still in full force and effect, and is in figures and words as follows:

> "It is understood and agreed that the Employer will, in all cases of increases or decreases of the working force, transfers, or in the event that changes in manu-

facturing makes it necessary to reorganize or consolidate departments, consider the following factors:

Factor A. Length of continuous service with the Employer.

Factor B. Knowledge, training, skill, ability and physical fitness.

When two or more employees are considered by the Employer to be relatively equal under Factor B, then length of continuous service with the Employer shall prevail."

6. Plaintiff employees, numbering said 105 persons now actually working at the defendant company plant, and the 74 said persons employed by the defendant company but now in the armed forces and services of this Country, have seniority and continuous length of service with the defendant company as is set opposite each of their respective names in schedules "A" and "B," which schedules are attached hereto, made a part hereof the same as if fully re-written herein at length;

7. Plaintiff employees state that the defendant company and the defendant UAW-CIO, notwithstanding the contract and agreement guaranteeing the seniority rights of all employees within the bargaining unit covered by said contract, which bargaining unit includes these plain-[fol. 41] tiff employees, set about and planned and are about to carry into execution a plan, scheme and design whereby these plaintiff employees, being superior and senior in seniority and length of service with the defendant company, are to be, and are being, deprived of their individual rights of seniority and to the individual rights and privileges which are theirs by reason of their length of service with the defendant company, in favor of other employees of the defendant company, said other employees being inferior and junior to these plaintiff employees in seniority and length of service with the defendant company, but which other employees or members of the deefndant UAW-CIO union; that the deefndant company and the defendant UAW-CIO have, and are, arbitrarily and in violation of the vested individual rights of these plaintiff employees, setting the individual seniority dates and rights of these plaintiff employees as of January 1st, 1944, whereas in truth and in

fact they have been employed by the defendant company, and their respective individual seniority rights and length of service with the defendant company runs, dates and commences from the respective dates set forth opposite their names on said Schedules or Exhibits "A" and "B," all of which is well known to these defendants and each of them; that under said scheme, plan and design said other employees, who are members of the defendant UAW-CIO union, and who have service or seniority with the company prior to January 1st, 1944, but not the length of service or seniority with the defendant company as that of plaintiff employees are being, and will be, preferred over and above said plaintiff employees and are being given, and will be given, greater seniority status and rights by the defendants to that of the individual vested seniority rights of these plaintiff employees; that to carry [fol. 42] said plan, scheme and design into full force and effect, the defendant company, with full knowledge and consent of the defendant UAW-CIO, and at the instigation and request of said defendant UAW-CIO, has posted on its bulletin boards a list setting forth the respective seniority dates of all its production employees, including these plaintiff employees, which list sets forth the dates of the said 105 plaintiff employees now actually working in the defendant company plants as of January 1st, 1944, and which list entirely omits to grant any seniority to those 74 plaintiff employees now in the armed forces and services of this Country, all of which is illegal, wrongful and contrary to the individual and vested seniority rights of said plaintiff employees and which is known to be so by these defendants, and each of them;

8. Plaintiff employees state that if said plan, scheme and design is actually carried into full force and effect, these plaintiff employees will suffer irreparable damage and injury, in that it will presently and in the future effect and deprive them of valuable seniority rights pre-dating the date of January 1st, 1944 as set by the defendants; that it will seriously hamper, interfere with and impede the present war effort to the irreparable damage, injury and harm of the War effort and those members of our armed forces, both at home and abroad, who are critically in need of the products and articles manufactured and assembled by the defendant company; that it will cause

plaintiff employees to be supplanted and replaced in their jobs and will cause them to be forced to give up their respective jobs by and to other employees who are junior and inferior to them in seniority and length of service with the company; that it will deprive them of the right to be employed at their highest and best skill and thus deprive [fol. 43] them of their right to enjoy and receive higher and better wages and jobs, based upon and in accord with their actual and true seniority rights and length of service with the defendant company; that it will cause them to be shifted about from job to job and shift to shift and will cause them to work on the second or night shift (7 P. M. to 5 A. M.), which shift is less desirable than the first or day shift, the working on shifts being governed by the principles of seniority;

9. Plaintiff employees state that said plan, scheme and design was fostered, spread and sponsored by the defendant UAW-CIO with the sole aim and purpose of preferring members of its organization and union, who are employees of the defendant company and who are inferior and junior in seniority and length of service with the company to that of these plaintiff employees, over and above that of these plaintiff employees, who are all members of the UAW-AFL, and who are superior and senior in length of service and seniority; that said scheme, plan and design has been agreed to by the defendant company and together these defendants are setting about to place same into full and complete force and effect and, unless restrained and enjoined from so doing they will place same into full and complete force and effect, all to the irreparable damage and injury of these plaintiff employees and for which they will have no adequate remedy at all;

10. Plaintiff employees state that the delay caused in giving notice or hearing of a motion or application for a temporary injunction will cause irreparable damage and injury to them and that they have already been deprived of seniority rights and have been ordered by the defendant company to report for the 2nd or night shift of work, commencing at 7 o'clock P. M., Monday, July 17th, 1944, where [fol. 44] employees inferior and junior to them are being preferred to them and are being placed in work on the first or day shift and the failure of these plaintiff employees to

so report to work, unless defendants are restrained and enjoined, will cause them to lose their jobs and to be dismissed by the defendant company.

Wherefore, plaintiff employees pray that the rights of the parties hereto be adjudged, declared and finally determined; that their rights under the contract be adjudged, determined and declared; that it be held, adjudged and decreed that these plaintiff employees are entitled to seniority as of the dates set forth in Exhibits "A" and "B" attached hereto and that the defendants be required to safeguard and protect said seniority as of said dates and to award and grant to plaintiff employees all rights and privileges of employees having seniority or length of service as of said dates; that the agreement and understanding between the defendants setting the seniority of plaintiff employees as of January 1st, 1944 be declared and held to be null and void and of no force and effect and not binding upon any of the parties hereto; that the seniority and rights of plaintiff employees be set and determined as of the respective dates set forth in said Exhibits "A" and "B"; that the seniority list posted by the defendant company be corrected and amended so as to show the dates of hiring of these plaintiff employees as of the dates set forth in said Exhibits "A" and "B" rather than the date of January 1st, 1944 now set forth on said posted list; that pending final determination of this cause a temporary injunction issue, with or without notice, as the Court may deem fit and proper, restraining and enjoining the defendants, and each of them, from in any way planning, scheming or designing or in any way carry- [fol. 45] ing out or into effect any plan, scheme or design depriving these plaintiff employees of their seniority dates as set forth on Exhibits "A" and "B" hereof; that the individual dates of seniority of the plaintiff employees be listed as of the said dates set forth in Exhibits "A" and "B" hereof and that the said posted seniority lists be corrected and amended to show the said dates instead of the date of January 1st, 1944; that upon final hearing said temporary injunction be made final and permanent; that if the Court deem notice necessary before the issuance of a temporary injunction, that the Court then issue a temporary restraining order pending the hearing and application or motion for a temporary injunction and that the defendants be restrained and enjoined as above set forth; for all other

relief which is just, proper and equitable to which they may be found entitled, and for his costs herein expended.

(S.) Morris Weintraub and Peter G. Noll, Attorneys for Plaintiff, PArkway 0527 or HEmlock 6933.

STATE OF OHIO,
County of Hamilton, ss:

Louis J. Hess, of legal age, being first duly cautioned and sworn, deposes and states that he is the plaintiff in the foregoing action; that he brings this action for himself and for all other persons similarly situated; that he has read the facts set forth in the foregoing petition and that same are true.

(S.) Louis J. Hess.

[fol. 46] Sworn to before me and subscribed in my presence by the aforesaid Louis J. Hess this 17th day of July, 1944, (S.) Gurdon W. Wilson, Notary Public in and for Hamilton County, State of Ohio. My commission expires Nov. 15, 1945.

PRAECIPE

To the Clerk:

"Issue summons, directed to the Sheriff of Hamilton County, Ohio, returnable according to law. Endorse: "Action for declaratory judgment; determination and protection of seniority rights of plaintiff and those similarly situated; restraining order, temporary injunction and permanent injunction; all other relief which is just, proper and equitable, and for costs."

Serve the defendants as follows:

The Trailer Company of America, a corporation, by serving its President, David R. Calhoun, Jr., at 31st & Robertson, Oakley, Cincinnati, Ohio;

International Union, United Automobile, Aircraft & Agricultural Implement Workers, CIO, Local Union #392, a voluntary unincorporated association, by serving Chester Nichols, its President, at % Trailer Company of America, 31st & Robertson, Oakley, Cincinnati, Ohio;

Chester Nichols, individually, and as President of International Union, United Automobile, Aircraft &

Agricultural Implement Workers, CIO, Local Union #393, a voluntary unincorporated association, at % [fol. 47] Trailer Company of America, 31st & Robertson, Oakley, Cincinnati, Ohio;

Willard Schmidt, individually, and as Secretary of International Union, United Automobile, Aircraft & Agricultural Implement Workers, CIO, Local Union #392, a voluntary unincorporated association, at % Trailer Company of America, 31st & Robertson, Oakley, Cincinnati, Ohio;

George Schneider, individually, and as Chairman of the bargaining committee of International Union, United Automobile, Aircraft & Agricultural Implement Workers, CIO, Local Union, #392, a voluntary unincorporated association, at % Trailer Company of America, 31st & Robertson, Oakley, Cincinnati, Ohio.

Morris Weintraub and Peter G. Noll, Attorneys for Plaintiff, HEmlock 6933 or PArkway 0527.

List of 105 Plaintiff Employees Now Employed and Working

Name	Date of Hiring (Seniority)	Name	Date of Hiring (Seniority)
Albert, Leroy	1-14-35	Grote, Gus	9-25-35
Allen, Louie	7-14-37	Hale, C.	3-14-41
Aston, Owen	6-14-29	Hatter, Orin	3- 8-37
Ball, Ola	7-30-36	Helms, Ralph	6- 2-37
Bergner, Paul	12-14-36	Henderson, George	6-23-39
Bess, Clyde	3-26-41	Hess, Louis	3- 8-37
Brammer, Jess	2-24-41	Hughes, Wm.	10-31-35
Bremmerhause, Fred	-14	Huth, John	6-30-37
Bryant, Ofie	1- 3-35	Johnson, V. I.	8-14-40
Burnett, Clyde	2-27-29	Jones, Ray	10-31-35
Calhoun, Walter	3- 5-35	Jones, Sam	4- 6-37
Cannon, Arthur	3- 2-36	Kephart, Edw.	1-20-41
Carrier, Harry	6- 7-39	Kline, Joe	3-17-41
Cayse, Carl	-42	Knauf, S.	6-28-32
Christopher, Frank	7-29-36	Kopittke, F.	8- 5-35
Clark, David	2-21-38	Lay, Harry	7- 7-37
Crawford, Ray	1-12-38	Luttrell, W.	2- 3-41
Crets, Fred	11- 6-35	McCabe, James	7- 7-37
Deubel, Fred	3- 5-15	Meece, Chas.	5-21-41
DeBord, Leslie	10- 8-35	Melisci, Nick	10- 5-32
Degerman, Albert	4-12-34	Mendell, J. L.	4-21-41
Distler, John	11-13-10	Metcalf, Robert	3-22-26
Duddey, Ray	1-13-38	Meyer, Theo	5-12-33
Earls, Roy	3-26-35	Mills, George	10-24-35
Ellis, Cafe	6-29-29	Mobley, Ernest	2-16-37
Erwin, Greene	9- 9-35	Mobley, R. C.	1- 5-38
Frey, Alfred	3- 5-34	Moore, Nelson	7-25-40
Firth, Alfred	4-23-36	Mullins, Cliff	2- 8-38
Gadberry, Ora	3-17-41	Nichols, Art	4- 2-37
Girdler, Edw.	9-25-35	Nunnelley, Lloyd	2- 6-37
[fol. 48]		Payne, James	10-26-36
Godsey, Ernest	3-24-41	Pearson, Burton	4- 3-35
Graber, W. L.	4-16-36	Ralston, Henry	11-16-36

Ralston, McKinley	7-22-35	Steinborn, Robert	7-19-43
Pflantz, E. J.	7- 6-33	Steins, William	8-19-40
Purden, George	12-20-41	Thoman, Harry	4-28-41
Raidt, Walter	3- 7-35	Tibbetts, Harry	3-15-35
Richmond, Claude, Jr.	12-14-43	Turner, Robert	2- 3-37
Richmond, C., Sr.	2- 2-38	Vaught, Daniel	7-28-36
Roberts, Bradley	5-27-36	Walls, Clinton	11-25-35
Roberts, Fred	7-27-36	Weingartner, J. P.	7-30-36
Rockey, Clyde	9-28-32	Whirls, Johnson	7- 7-37
Schaerges, Cliff	10- 5-32	Whirls, Lawrence	2- 8-35
Schneider, Nick	3-30-36	Wilson, Earl	5-22-36
Scott, John	1-11-25	Williams, Sim	5-24-33
Scully, Dan	12-11-34	Wilson, Lonhie	2- 3-37
Sexton, John	3- 4-38	Wilson, Waldon J.	3-25-41
Shepard, Ray	7- 9-23	Wilson, Woodrow J.	6- 2-37
Simpson, Delmar	1-11-38	Wolf, Carl	6-21-39
Sims, Delbert	4-24-36	Wood, Martie	1-20-41
Smoot, Dewey	10-13-39	Brownlee, H. W.	3- 3-41
Spears, Glance	10-22-26	May, Henry	2-11-37
Stein, Henry	4- 1-36	Birks, Lyle	11-20-35

[fol. 49]

List of 74 Employees Now in the Armed Forces

Name	Date of Hiring (Seniority)	Name	Date of Hiring (Seniority)
Albers, Frank	3-12-36	Hunter, Garland	10- 4-26
Bardill, Robert R.	12-13-38	Inskeep, Raymond	12- 8-36
Baugh, Bert	4-22-35	Jenkins, Robert	3- 6-34
Baugh, Floyd D.	2-26-36	Jones, Francis K.	3- 6-36
Bender, John	10- 6-32	Jones, Paul	10-18-39
Bishop, Elmer A.	10-30-35	Kidd, Howard	4- 1-41
Bowers, Samuel	10-24-39	Lakin, Stanley	11-18-35
Britt, Thomas	4-19-33	Lang, Robert	4- 9-37
Buckley, Stanley Lee	3-25-41	Maddox, Milton	8- 5-36
Burger, Thomas	4- 8-41	Mappes, Roy	5-21-34
Burns, Robert	2-10-38	Masram, Harry	1-11-38
Butz, Ervin	3-20-41	McWharter, Charles	3- 5-41
Byard, Elmer	12- 7-38	Miller, Roy	3-26-38
Casada, Robert	1-19-37	Molloy, James	6- 8-39
Chadwell, Welbie M.	3-12-36	Molloy, Richard	6- 8-39
Cordes, Walter	3-17-41	Nair, Wm.	6-14-39
Coulter, Robert	3-31-41	Neeley, Homer	4-21-41
Cowdrey, Victor	1-17-41	Nichols, Karl C.	3-26-41
Davis, Balum Agie	12- 9-36	Nunnelley, Charles	11-25-35
Douglas, Marcus Ray	3-10-41	Nunnelley, James	1- 5-37
Fair, Stanley C.	5-24-39	Payne, Owen	10-14-36
Farlow, Robert	6-13-39	Rainey, Ernest	1-11-38
Flory, Jos. A.	2-20-41	Roberts, Ancil	6-24-37
French, Elmer	3-29-37	Robinson, Chas. W.	12- 6-38
Frey, Carl	12-15-41	Schultian, Melvin E.	12-20-38
Gagan, John	9- 2-26	Seta, William	12-21-38
Gamm, Jr., Henry A.	10- 8-35	Smith, Elwood	12-28-37
Goodson, Gladys	3- 3-41	Spangler, Orlin	1-11-38
Gover, Frank	3-24-41	Stratton, Paul H.	1-27-41
Hatter, Carlos	10-29-35	Surber, Albert	2-28-41
Heaverin, Ura	3-12-41	Szœke, Frank	2-10-41
Henderer, Arthur C.	12-29-38	Tribbe, Chas. K.	10-15-35
Hensley, Jr., Geo.	1- 4-38	Waddell, Edw.	8- 9-33
Horn, Wm.	3-10-41	Walls, Cecil	4-18-32
Orleck, Lou	5-15-33	Walls, Roy Cleon	1- 6-38
Russell, Burton	1- 7-38	Walstrom, Jack W.	3- 3-41
Wright, Wilmer Carl	6-21-39	Zins, Walter	4- 8-41

[fol. 50] DEFENDANT'S EXHIBIT 2

Answer of the Trailer Company of America, Defendant

1. Defendant, The Trailer Company of America, admits that it is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and is engaged in business at 31st Street and Robertson Road, Oakley, Cincinnati, Ohio; defendant says that its principal office and place of business are located at said address, and admits that it is engaged in the manufacturing, assembling, sale, and distribution of trailers, drags, and kindred automobile units, all of which are being used in the present War Effort and are urgently and vitally needed now in order to insure Victory and a successful conclusion of the present War; admits that it has in its employ approximately 1900 production workers, among them being the plaintiff Employees as defined in the petition herein, and some other five hundred persons now in the armed forces and services of this country; and admits that it is referred to as "Employer" in the contract alleged in the petition.

2. This defendant says that the United Automobile, Aircraft and Agricultural Implement Workers of America, Local 392, UAW-CIO, hereinafter referred to as the UAW-CIO Union, is a labor organization affiliated with the Congress of Industrial Organizations, and admits to membership employees of this defendant company.

3. This defendant says that the International Union, United Automobile Workers of America, A. F. of L. Local No. 131, hereinafter referred to as UAW-AFL Union, is a labor organization affiliated with the American Federation of Labor, and admits to membership employees of this company.

[fol. 51] 4. Prior to August 6, 1943, the UAW-CIO Union filed with the National Labor Relations Board two separate petitions alleging that questions affecting commerce had arisen concerning the representation of employees of The Trailer Company of America and The Highland Body Manufacturing Company, being cases No. R-5562 and R-5563, which were consolidated and tried together before that board. Then The Highland Body Manufacturing Company was a corporation duly organized and existing under the laws of the State of Ohio and was the wholly-owned and

managed subsidiary of The Trailer Company of America, and the plant of The Highland Body Manufacturing Company was located in Elmwood Place, Cincinnati, Ohio, where it was engaged in the manufacture, sale, and distribution of trailers and also in the manufacture of cabs; then the operations of these two companies were integrated and employees of The Highland Body Manufacturing Company were being permanently transferred to the Oakley plant of The Trailer Company of America and to its payroll and were thereby losing their separate identity; employees of the same skills, performing the same duties for the same employer, were merged in the same respective departments at said Oakley plant. The employees in the cab and woodworking departments of The Highland Body Manufacturing Company were then engaged in the manufacture of wood cabs and after being transferred to said Oakley plant continued in said departments; the physical transfer of machinery and these employees from said Elmwood Place plant to the cab and woodworking departments at the Oakley plant did not result in any intermingling of these employees with the employees previously located at said Oakley plant; the work in the cab and woodworking de- [fol. 52] partments is performed independently of the other departments and the employees in these departments possess skills of a different nature from those of the metal workers in the other departments. The cab department is composed of those employees who were regularly assigned to work on the fourth floor of the Goodall Building at the Oakley plant in assembling cabs; the woodworking department is composed of those employees who are regularly assigned to work on the first floor of the Goodall Building at the Oakley plant and work in lumber in the mill. All remaining employees of both companies, including the watchmen, foremen, plant engineers, and maintenance employees, are intermingled in the other departments in the Oakley plant. Since July, 1940, the employees of this company in both the Elmwood Place plant and the Oakley plant have been represented by one local union in a single industrial unit. On July 1, 1942, the UAW-AFL Union entered into a written contract with The Highland Body Manufacturing Company, of Elmwood Place, Ohio, and The Trailer Company of America located at Oakley, Cincinnati, Ohio, as a result of collective bargaining with that Union. Therein said union was referred to as the "Union", and the

above two companies were referred to as the "Company." This agreement provided for separate bargaining committees in each plant, but otherwise treated the employees of the two companies as a single industrial unit. This agreement further provided:

"Article 14

"Section 2. Seniority shall be determined from the last date of hiring. Seniority shall be departmental. Day and night shifts shall be considered one department, with departmental seniority ruling throughout the entire department."

[fol. 53] "Section 6. Any employee may transfer permanently to another department but will become the junior to all the employees on the seniority list in the department to which transfer is made."

"Article 17

"Section 2. Up to date seniority lists for each department shall be maintained between the company and the shop committee; such lists shall be posted in a conspicuous place where most accessible in all departments."

5. Upon due notice and hearing, on August 6, 1943, the National Labor Relations Board found and issued its decision and direction of election determining that the operations of the two companies constituted jointly an Employer within the meaning of Section 2 (2) of the National Labor Relations Act. It further found and determined that all production and maintenance employees of the companies working at the plants of The Highland Body Manufacturing Company and of The Trailer Company of America, including watchmen, foremen, and plant engineers, but excluding armed guards, Cab Department, and Woodworking Department employees, superintendents, foremen, and any other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise affect changes in the status of employees, or effectively recommend such action, constitutes a single appropriate bargaining unit for the purposes of collective bargaining within the meaning of section 9 (b) of the National Labor Relations Act. The National Labor Relations Board therein found and deter-

mined that the employees in the cab and woodworking departments formed an identifiable group at the plant of The Highland Body Manufacturing Company and after transfer [fol. 54] to said Oakley plant would continue to constitute such a group in said Oakley plant. When this decision was issued, the operation of the two companies was in the process of integration, which was fully accomplished prior to January 1, 1944.

6. On December 8, 1943, The National Labor Relations Board rendered its supplemental decision and certification of representatives, certifying to this defendant that the UAW-CIO Union had been designated and selected by a majority of all production and maintenance employees of The Trailer Company of America and The Highland Body Manufacturing Company, both of Cincinnati, Ohio, including watchmen, firemen, and plant engineers, but excluding armed guards, cab department and woodworking department employees as therein defined, superintendents, foremen, and other supervisory employees, with authority to hire, promote, discharge, discipline, or otherwise affect changes in the status of employees or effectively recommend such action, as their representative for the purpose of collective bargaining, and that pursuant to Section 9 (a) of the National Labor Relations Act, the said UAW-CIO Union is the exclusive representative of all such employees for the purposes of collective bargaining, with respect to rates of pay, wages, hours of employment, and other conditions of employment.

7. On January 3, 1944, negotiations in collective bargaining were started between this company and said UAW-CIO Union.

8. On June 21, 1944, this defendant entered into a written agreement with said UAW-CIO Union; therein this defendant was referred to as the "Employer" and this union was referred to as the "Union." This agreement provides as follows:

[fol. 55] "Article II

Recognition

Section 1. The Employer recognizes the Union as the exclusive representative for the purpose of collec-

tive bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment for all employees in the Employer's plant, but excluding superintendents, assistant superintendents, general foremen, foremen, and all other persons in a supervisory capacity, those employed in Sales, Accounting, Personnel and Industrial Relations Department, all clerical employees, engineers, designers, draftsmen, kitchen and cafeteria help, armed guards and the Cab and Woodworking departments."

"Article III

Union Status

"(a) When a new employee has served thirty (30) working days probationary period from the last date of hiring and it is agreed that he is capable of doing the work for which he was hired, the said employee shall become a member of the Union; furthermore, to be eligible for continuous employment he must remain in continuous good standing in the Union. A member in good standing is a member who has paid all dues, fines and assessments on or before the first day of each month.

"(b) The above clause excludes those employees of the company formerly employed at the Highland Body Plant who were transferred from that Plant to Oakley when their operations ceased at the Highland Plant. They shall be free to decide whether or not they will join the Union. All other present employees of company, covered by this agreement, who are not now serving their 30 day probationary period, referred to [fol. 56] in III (a); shall have thirty (30) days from the date of this contract to become members of the Union in good standing."

"Article VII

Seniority

"Section 1. It is understood and agreed that in all cases of increase or decrease of the working force, the principles of seniority as herein set forth shall govern.

"Section 2. New employees will be considered probationary employees until they have worked for the Employer thirty (30) days. During this period the Employer may transfer, lay off, or discharge such probationary employee as it finds necessary and such action shall not constitute grievance against the Employer.

"After the 30-day working period the employee shall be entered on to the seniority list as of his date of employment. All employees of both day and night shifts shall be entered on the same seniority list.

"Section 3. Representatives of the Union, during their term of office, shall have preference of employment in their respective jurisdiction and at the expiration of their term of office shall cease to have such employment preference. Such preferential employment shall apply only in the case of decreases in the working force of their respective jurisdictions.

"Section 4. It is understood and agreed that the Employer will, in all cases of increases or decreases of the working force, transfers, or in the event that changes in manufacturing makes it necessary to reorganize or consolidate departments, consider the following factors:

Factor A. Length of continuous service with the Employer.

[fol. 57] Factor B. Knowledge, training, skill, ability, and physical fitness.

"When two or more employees are considered by the Employer to be relatively equal under Factor B, then length of continuous service with the Employer shall prevail.

"Section 5. Seniority shall be by departments. Where changes in methods, products, or policies would otherwise require the permanent laying off of employees, the seniority of the displaced employee will become plant-wide and they will be transferred out of their department in line with their seniority to jobs they are capable of doing.

"Departments shall be those divisions of the Plant which are considered by the Employer as a unit of

operation. For the purpose of seniority the departments are as follows:

"(1) Layout
(2) Machining Department
(3) Tire and Axle
(4) Chassis Assembly
(5) Painting
(6) Light Metal
(7) Body Assembly
(8) Inspection
(9) Maintenance
(10) Stock Dept. (including Rec. & Truck Dr.)
(11) Shipping Department
(12) Service Stock
(13) Welding
(14) Riveting
(15) Export Parts Processing

"Section 6. Seniority lists of the employees shall be compiled by the employer. The Employer shall furnish to the Union once each 90 days a corrected copy of the seniority lists, and a like copy shall be posted by the employer on the bulletin boards.

[fol. 58] "Section 7. When there is a curtailment of work:

"(a) Probationary employees shall be the first to be laid off.

"(b) The Employer will consider a reduction in working hours to avoid general layoff as conditions at the time may warrant, and will notify the Union representatives for a discussion of the possibility of reducing working hours to avoid layoff.

"(c) When an employee is transferred from one department to another due to curtailment of work there will be no loss of seniority. Any employee transferred from one department to another will be considered a temporary employee in his new department for a period of 30 days. At the end of 30 days his seniority will be transferred from his former department. Rate of pay for the work assigned will be paid. Employees who decline such work and are laid off shall retain their seniority.

"Section 8. When there is an increase of working force after a layoff:

"(a) The reverse of the layoff procedure shall be followed.

"(b) Before any new employees are hired, employees who are laid off shall be first offered employment in reverse order of their layoff.

"(c) It shall be an employee's prerogative to transfer back into his original department any time an opening occurs, in line with his seniority. Any employee who accepts such transfer to another department and who refuses to return to his original department when his turn comes, automatically becomes a permanent employee of the department to which he was transferred. Then he cannot return to his old department at any future date without first being a temporary employee for 30 days, as pointed out in Section 9(a).

"(d) Notification of return shall be directed in writing to the last known address of the employee, as it appears on the records of the Employer.

[fol. 59] "Section 9. Transfers.

"(a) Any employee may apply for a permanent transfer to another department and upon consideration of Factors A and B, may be so transferred. In the event of such a transfer, the employee shall be given a trial period of thirty days at his old rate of pay, during which time he shall be considered a temporary employee in the new department. If at any time during this trial period, the employee is found incapable of doing the work, he shall be returned to his former department. If the employee proves he can do the work, his full seniority shall be transferred to his new department at the end of his thirty day trial period.

"(b) Permanent transfers from one department to another shall become effective only after all employees of the department to which transfer is to be made are given consideration on basis of Factors A and B by the Employer to fill such openings.

"Section 10. Any employee who has been promoted to a supervisory position shall retain his seniority,

and in the event that he is subsequently transferred to the Bargaining Unit, he will be credited with the seniority he had at the time of transfer plus all seniority accumulated while working in the supervisory capacity.

"Section 11. It is agreed that employees required for making tool dies, jigs, fixtures, for taking inventory, and for any other work of special nature, requiring special knowledge, skill or experience, may be selected without regard to seniority or effect upon their seniority.

"Section 12. Employees who have been laid off, or whom the Company has failed to recall after a layoff in violation of the seniority provisions herein, shall be paid for all time lost.

"Section 13. Employees excluded by Article II, Section 1, shall not perform any work regularly performed by employees covered by this agreement.

[fol. 60] "Section 14. The existing Selective Service Laws, and any changes or amendments which may be made in them by the President or any other duly authorized government agency, governing the seniority rights of returning servicemen, shall be deemed a part of this agreement."

9. This defendant admits that said contract covered, among other things, the seniority and terms and conditions of employment of all its employees, including these plaintiff employees, who are employees of the departments within the said appropriate bargaining unit, which excludes the Cab and Woodworking departments.

10. This defendant admits that the plaintiff employees are not and are not required to be members of the defendant UAW-CIO Union. This defendant says that the plaintiff employees herein are those employees of this defendant who formerly were employed at The Highland Body Manufacturing Company's plant and who were transferred from that plant to the plant of the Company at Oakley, when operations ceased at The Highland Body Manufacturing Company plant.

11. This defendant admits that the copy of said contract attached to the petition and marked Exhibit C is a true

and correct copy of said agreement and admits that said contract has been in full force and effect ever since June 21, 1944, and is still in full force and effect.

12. This defendant says that there are some errors in the two lists of plaintiff employees set forth in the schedules A and B attached to and made a part of the petition herein, that said errors should be corrected as follows:

[fol. 61]

Name of Employee	Date of Hiring Petition States	Correct Date	Remarks
Allen, Louie	7-14-37	10-15-35	
Aston, Owen	6-14-29	6- 4-29	
Calhoun, Walter	3- 5-35	3-12-34	
Cayse, Carl	42	6-19-39	
Kopittke, F.	8- 5-35	8- 5-33	
Lay, Harry	7- 7-37	2-19-39	
Meyer, Theo	5-12-33	6-12-33	
Moore, Nelson	7-25-40	1- 4-38	
Ralston, McKinley	7-22-35	7-22-36	
Purden, George	12-20-41	8-29-39	
Scott, John	1-11-25	1-11-35	
Wharls, Johnson	7- 7-37	12-14-36	
Birks, Lyle	11-20-35		Rehired 4-25-44
Cowdrey, Victor	1-17-41	6-12-39	
Gray, Carl	12-15-41	6-14-39	
Gamm, Jr., Henry A.	10- 8-35	10- 7-35	
Horn, Wm.	3-10-41	3-25-41	
Miller, Roy	3-26-38	3-26-36	
Neeley, Homer	4-21-41	3-10-41	
Nunnelley, James	1- 5-37	1- 6-37	
Roberts, Ancil	6-24-37		Quit 9- 4-43
Surber, Albert	2-28-41		Quit 5-14-43

Schedule A should be further corrected as follows: Roy Earls should be eliminated as he was discharged on June 6, 1944, for excessive absenteeism and is not working and is not an employee of this defendant. Lyle Birks was suspended by the American Federation of Labor Union in November, 1942, because he was no longer in good standing with that Union, and was then discharged under the terms of the union contract with this defendant; he was rehired by this defendant on April 25, 1944. Two names should be added to this schedule A: Robert Jahn, hired February 21, 1938, Joseph Graybeal, hired June 1, 1939.

Schedule B should be corrected by eliminating the names of Garland Hunter, and Milton Maddox, as they are lumber handlers, are not working in the appropriate bargaining unit governed by the contract alleged in the petition, but are employees in the appropriate bargaining unit in-
[fol. 62] cluding the Cab and Woodworking departments.

To Schedule B should be added the following three employees: Eugene Lewsader, hired June 23, 1939; Carlos McGuffey, hired April 15, 1941; and Robert Welsh, hired January 10, 1938.

13. This defendant does not admit that seniority (under the provisions of said contract alleged in the petition) of these plaintiff employees set forth on schedules A and B began with the dates of their respective hiring set forth in said schedules, but denies, for the purpose of this case, that their respective seniorities began on the date of their respective hiring by The Highland Body Manufacturing Company, as this defendant has stated repeatedly to its employees and now again states that it will agree to accept any seniority lists based on continuous length of service in accordance with the contract, upon which its employees can agree.

14. This answering defendant states that it intends to and is attempting to give force and effect to the provisions of said written contract set forth in the petition by assigning its employees within the appropriate bargaining unit covered by said contract, which bargaining unit includes these plaintiff employees, to their jobs in accordance with the seniority of said employees as insisted upon by the duly selected and certified UAW-CIO union, and in accordance with its application of the provisions of the contract to all the facts regarding each respective employee within that appropriate bargaining unit, as this company recognizes this union duly certified by the National Labor Relations Board, and desires to comply with its wishes respecting seniority of the employees this union duly represents under the National Labor Relations Act, including the plaintiff employees, who are in the minority [fol. 63] in this appropriate bargaining unit, and defendant states that it has complied with the wishes of the duly authorized agents of the plaintiff employees regarding their respective seniority rights in accordance with the terms and provisions of the National Labor Relations Act. This defendant denies that it, either alone or in connection with the defendant, UAW-CIO Union, is planning or carrying into execution any plan, scheme, or design for the purpose of depriving plaintiff employees or any of them of their respective seniority rights to jobs as provided in said

contract and denies that it intends to do so. Defendant denies that it is acting arbitrarily and in violation of the seniority rights of these plaintiff employees as defined in said written contract.

15. This defendant admits that it has set the individual seniority dates and rights of these plaintiff employees as of January 1, 1944, and states that it did so in accordance with the request of the UAW-CIO Union as the duly selected and certified agent of plaintiff's employees for the purpose of collective bargaining. This defendant admits that it has posted on its bulletin boards a list, in writing, agreed upon in collective bargaining between this defendant and the UAW-CIO Union as an interpretation and supplement to its contract of June 21, 1944, setting forth the respective seniority dates of all its production employees, including these plaintiff employees, and admits that such list sets forth the dates the said plaintiff employees now actually working at its Oakley plant as of January 1, 1944, and that said list gives the same seniority to the plaintiff employees now in the armed forces and services of this country.

16. This defendant denies that the above is illegal, wrongful, or contrary to any individual and fixed senior- [fol. 64] ity rights of said plaintiff employees, it says that the acts of this defendant have been in accordance with the terms of said written contract, as interpreted and supplemented by the agreed seniority list, with the wishes of the duly constituted agent of plaintiff employees, and with the duties of this defendant in continuous collective bargaining under the National Labor Relations Act.

17. This defendant admits that, unless restrained by this court from doing so, it will continue to so assign jobs in accordance with the seniority rights of its employees as set forth on said seniority list and as above set forth.

18. This defendant admits that it ordered plaintiff employees to report for the second or night shift of work, commencing at seven P. M., Monday, July 17, 1944, but denies that these plaintiff employees thereby were deprived of any of their former seniority rights, except as their duly constituted collective bargaining agent agreed on their behalf, as above stated.

19. This defendant further denies each and every allegation in the petition contained, not hereinbefore specifically admitted to be true.

Wherefore, The Trailer Company of America, defendant herein, prays that the rights of the parties hereto, plaintiffs and defendants, be adjudged, declared, and finally determined by this court; that their rights under the contract be adjudged, declared, and determined by this court; that the seniority rights of each of its employees be adjudged, declared, and finally determined by this court; this defendant also prays that the court refuse to issue any temporary or permanent injunction [fol. 65] against this defendant, and that it recover from the plaintiff its costs herein incurred.

——— ———, Attorneys for the Defendant, The Trailer Company of America.

STATE OF OHIO,
Hamilton County, ss:

David R. Calhoun, Jr., being first duly sworn, deposes and says that he is President of The Trailer Company of America, a Delaware corporation, one of the defendants in the above-entitled action, and that the facts stated in the foregoing answer are true as he verily believes.

——— ———.

Sworn to before me and subscribed in my presence, this 20th day of July, 1944. ——— ———, Notary Public in and for Hamilton County, Ohio.

DEFENDANT'S EXHIBIT 3

Answer of International Union, United Automobile, Aircraft, Agricultural, Implement Workers of America (UAW-CIO) Local Union #392, et al.

Come now the defendants, International Union, United Automobile, Aircraft, Agricultural Implement Workers of America (UAW-CIO) Local Union #392, improperly [fol. 66] named in the petition as International Union, United Automobile, Aircraft & Agricultural Implement Workers, CIO, Local Union #392, and Chester Nichols, Willard Schmidt and George Schneider, individually and

as officers in the union, and for Answer to the Petition deny that this Court has jurisdiction over the matters and issues raised in the petition. It appearing from the face of the Petition that this defendant union was certified by the National Labor Relations Board as the bargaining agent for all the employees in the Trailer Company of America, complaints of individual employees must be taken up in accordance with the provisions of the National Labor Relations Act, (49 Statutes, 449), under Section 10, of said act, exclusive jurisdiction is given by Federal Law to said board, and this Court therefore has no jurisdiction in this matter.

Second Defense

For a second defense, and if the Court determines that it has jurisdiction in this mater, then these defendants state that defendant union as bargaining agent represented plaintiffs and all other employees, whether members of the defendant union or not, and bargained and negotiated with the defendant employer from January 3rd, 1944 to date for the purpose of agreeing on a contract; that certain of the items in the contract could not be agreed upon and by designation of the War Labor Board, Rt. Rev. Monsignor Marcellus Wagner was designated as a hearing officer, at which time all disputed questions were heard and submitted to him, and his opinion thereafter issued, was duly approved by the Regional War Labor Board, that following said opinion and approval thereof, a written contract was entered into on June 21st, and as part and parcel of, said [fol. 67] contract, a seniority list was agreed upon by the defendant employer and the defendant union; and that in said list plaintiff and those on whose behalf he seeks to bring this suit were placed on the seniority list as of January 1st, 1944, that being the date when their employment terminated with the Highland Body Manufacturing Company, and when their employment commenced with the defendant employer herein.

These defendants state that said contract of June 21st, 1944 and the seniority list prepared shortly thereafter were the results of the bargaining and negotiations between the defendant union as the agent for his employees certified by the National Labor Relations Board and the defendant employer, that said contract is in full force and effect.

Third Defense

For a third defense, defendants deny each and every allegation contained in the Petition other than those setting forth facts which are contained in the herein Answer.

Wherefore, having fully answered, defendants pray that the Petition herein be dismissed and that they may go hence without day, and with their costs herein expended.

Sol Goodman, Attorney for Defendants.

STATE OF OHIO,
Hamilton County, ss.:

George Schneider, being first duly cautioned and sworn states that he is the Chairman of the Bargaining Committee of the defendant, International Union, United Automobile, Aircraft, Agricultural Implement Workers of America (UAW-CIO), Local Union #392, et al. one of the defendants herein, and that he is one of the defendants herein, and [fol. 68] that the facts and allegations contained herein above are true to the best of his knowledge and belief.

_____

Sworn to before me and subscribed in my presence this —— day of ——, 1944. —— ——, Notary Public, Hamilton County, Ohio.

DEFENDANT'S EXHIBIT 4

31 O. O. 566, also Vol. 31 O. L. R. 566 Dec. 10, 1945 issue.

DEFENDANT'S EXHIBIT 5

Judgment Entry

This day this cause came on to be heard on the pleadings, testimony and evidence and was submitted to the court.

Upon consideration the court finds on the issues joined in favor of the defendant and coming on to declare the rights of the plaintiff and those on whose behalf this action is instituted, the court finds:

1. The defendant Union and the defendant Company had a legal right to enter into a contract fixing the seniority

dates and rights of plaintiff's employees as of January 1st, 1944.

2. Seniority rights are rights arising out of the contract between defendant employer and its employees represented by the defendant union as the exclusive bargaining agent and such seniority rights can not arise merely by reason of the fact that an employee has worked for an employer for a number of years unless the employer and employee have so contracted.

[fol. 69] 3. The fact that the National Labor Relations Board recognized the Trailer Company of America and the Highland Body Manufacturing Company as a single employer and permitted the election of an exclusive bargaining agent for all such employees does not automatically require the defendant Union as bargaining agent to disregard the separate corporate legal entities of the two corporations and compel the bargaining agent to consider the two corporations as one.

4. The court further declares that the defendant Union treating the employees of Highland Body Manufacturing Company as new employees of the Trailer Company of America as of January 1st, 1944 acted within their lawful rights in determining that the dissolution of the Highland Body Manufacturing Company terminated the employment of plaintiff and those on whose behalf this action is brought.

5. The court further declares that it is not empowered to contract for the plaintiff or make a new contract "that power exists only in the exclusive bargaining agent under the provisions of the National Labor Relations Act so long as that agent acts within the law.

It is, therefore, ordered, adjudged and decreed that the petition herein be dismissed at the costs of the plaintiff. To all of which plaintiff excepts.

[fol. 70] DEFENDANT'S EXHIBIT 6

COURT OF APPEALS, HAMILTON COUNTY, OHIO

No. 6503

LOUIS J. HESS, et al., Plaintiff-Appellant,

v.

THE TRAILER COMPANY OF AMERICA, a Corporation, et al., Defendants-Appellees

Decree and Entry of Affirmance

This cause came on to be heard on the notice of appeal on questions of law and on questions of law and fact, upon the transcript of evidence and on briefs and arguments of counsel and was submitted to the court.

Upon consideration the court finds that there should be entered herein a decree similar to the decree made by the lower court.

Upon consideration hereof the court finds on the issues joined in favor of the defendants-appellees and coming on to declare all the rights of the plaintiff-appellant and those on whose behalf this action was instituted, the court finds:

1. The defendant Union and the defendant Company had a legal right to enter into a contract fixing the seniority dates and rights of plaintiff employees as of January 1st, 1944.

[fol. 71] 2. Seniority rights are rights arising out of the contract between defendant employer and its employees represented by the defendant union as the exclusive bargaining agent and such seniority rights cannot arise merely by reason of the fact that an employee has worked for an employer for a number of years unless the employer and employee have so contracted.

3. The fact that the National Labor Relations Board recognized the Trailer Company of America and the Highland Body Manufacturing Company as a single employer and permitted the election of an exclusive bargaining agent for all such employees does not automatically require the defendant Union as bargaining agent to disregard the separate corporate legal entities of the two corporations

and compel the bargaining agent to consider the two corporations as one.

4. The Court further declares that the defendant Union treating the employees of Highland Body Manufacturing Company as new employees of the Trailer Company of America as of January 1st, 1944 acted within their lawful rights in determining that the dissolution of the Highland Body Manufacturing Company terminated the employment of plaintiff and those on whose behalf this action is brought.

5. The court further declares that it is not empowered to contract for the plaintiff or make a new contract "That power exists only in the exclusive bargaining agent under the provisions of the National Labor Relations Act so long as that agent acts within the law."

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be and the same hereby is affirmed and that the petition be dismissed at the costs of the plaintiff-appellant.

[fol. 72] The court finding that there was reasonable grounds for appeal, assesses no penalty. To all of which plaintiff-appellant excepts.

DEFENDANT'S EXHIBIT 7

See Vol. 31 O. L. R., page 51, October 15, 1945, issue.

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted].

COMPLAINT—Filed September 18, 1945

I

The Trailmobile Company is now, and was at all times hereinafter mentioned, a corporation duly incorporated and organized under the laws of the State of Delaware and engaged in business in Ohio with its office and principal place of business in Cincinnati, Ohio.

II

Plaintiff is a discharged veteran from the armed forces of the United States having entered the service on October 23, 1942, and having received an honorable discharge from said service and otherwise qualified for reemployment at the time of his discharge as aforesaid.

[fol. 74]

III

For many years prior to January 1, 1944, defendant, The Trailmobile Company, and The Highland Body Manufacturing Company were engaged in Cincinnati, Ohio, in the manufacture of trailers, semi-trailers, and cabs for automobile trucks, the two companies both being employed in the manufacture of the same or similar commodities, and the stock in both companies being held by the same individuals, and the same Board of Directors and executive officers administering and managing the affairs of both companies.

IV

During the year 1943 the directors and executive officers of the two corporations aforesaid, in carrying out a policy of uniting the operations of these two companies, removed from the plant of The Highland Body Manufacturing Company all of the tools, equipment and supplies of the said The Highland Body Manufacturing Company to the premises of The Trailmobile Company and transferred the employees of said The Highland Body Manufacturing Company to the premises of The Trailmobile Company.

V

On January 1, 1944, said transfer of employees and physical equipment having been completed, the absorption of The Highland Body Manufacturing Company into The Trailmobile Company was submitted to the stockholders of both corporations and said absorption approved, and by the plan duly adopted, it was agreed that The Trailmobile Company "shall assume and pay all debts, liabilities and obligations of The Highland Body Manufacturing Company and shall assume and perform all outstanding [fol. 75] contracts of The Highland Body Manufacturing Company."

VI

Plaintiff says that on or about the 8th day of February, 1935, he entered the employ of The Highland Body Manufacturing Company and remained in said employ until he entered the military service of the United States on October 23, 1942, as aforesaid; that while employed by The Highland Body Manufacturing Company he worked under a number of employment contracts entered into by the bargaining agent of all the employees of said company with the representatives of The Highland Body Manufacturing Company, whereby it was provided as follows: "seniority shall be determined from the last date of hiring; seniority shall be departmental; night and day shifts shall be considered one department with departmental seniority ruling throughout the entire department."

The above provision was included in the contract entered into as aforesaid on July 1, 1942, and was in full force and effect between plaintiff and The Highland Body Manufacturing Company on the date that plaintiff left the employ of The Highland Body Manufacturing Company and entered military service as aforesaid.

VII

Plaintiff further says that he returned from service and was employed by The Highland Body Manufacturing Company May 3, 1943, and was restored to his former position as painter in the Painting Department, and to all privileges arising out of seniority therein.

Plaintiff further says that on or about July 15, 1944, in violation of his seniority rights, he was notified by the defendant, The Trailmobile Company, that his seniority [fol. 76] rights as a former employee of The Highland Body Manufacturing Company would date from January 1, 1944, the date of the absorption of The Highland Body Manufacturing Company by The Trailmobile Company.

VIII

Thereafter, defendant herein again restored plaintiff to his date of hiring, as regulating his seniority, to-wit: February 8, 1935, pursuant to a directive of the Selective Service System of the United States, and he continued to benefit by such seniority status until on or about September 3, 1945, at which time the defendant herein, in

violation of said seniority status, transferred this plaintiff from his position in the Painting Department, in which Department he had the highest seniority and in which Department he was drawing a pay of $1.05 per hour, to the Stock Department where defendant herein threatens to and will, unless restrained by this Court, reduce his pay to $0.83 per hour and materially reduce his seniority rating based upon a fictitious employment date of January 1, 1944.

By reason of the aforesaid, plaintiff has been deprived of his seniority rights, fixed and established as hereinbefore set forth by the contract between The Highland Body Manufacturing Company and its employees, including this plaintiff, and also, this plaintiff has been deprived of his statutory rights to seniority as granted by Section 308, Title 50, of the laws adopted by the Congress of the United States and published in the United States Code Annotated, known as The Selective Training and Service Act, as amended. By reason of the foregoing, the acts of the defendant herein have irreparably damaged this plaintiff for which he has no adequate remedy at law.

[fol. 77] Wherefore, this plaintiff prays that defendant herein be temporarily restrained from reducing the pay of plaintiff below $1.05 per hour and from charging the seniority status of plaintiff to the control date of January 1, 1944, and that a mandatory injunction be directed to defendant herein requiring this defendant to reinstate plaintiff in his former position in the Painting Department operated by this defendant and to grant to this plaintiff all rights heretofore taken from him without loss of his seniority, and for such other and further relief as he may be entitled to in equity.

(S.) Byron B. Harlan, United States Attorney, Room 722, United States Court House and Post Office, Cincinnati, Ohio.

Duly sworn to by Lawrence Whirls. Jurat omitted in printing.

[fol. 78] IN UNITED STATES DISTRICT COURT

INTERVENING PETITION OF INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-CIO LOCAL 392—Filed October 2, 1945.

Comes now intervening petitioner, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW CIO Local 392, and having heretofore been made a party defendant herein for answer to the complaint states:

1. It generally denies each and every allegation contained in the complaint excepting only such allegations as are hereinafter set forth.

2. This defendant states that all matters herein have been fully adjudicated in the case wherein Louis J. Hess, individually and as an employee of the Trailer Company of America for himself and for all other persons similarly situated was plaintiff and the defendant herein was defendant, being cause No. A-88735 in the Court of Common Pleas of Hamilton County, Ohio which judgment was affirmed in case No. 6503 in the Court of Appeals of Ohio and a motion to certify said case is now (bearing No. [fol. 79] 30392) in the Supreme Court of Ohio. Said adjudication and said case disposes of issues herein involved and is binding upon the plaintiff herein and upon the court in the present controversy.

3. For a third defense this defendant states that said complaint should be dismissed on the grounds that it shows on the face thereof that plaintiff has no cause of action.

Wherefore, having fully answered, this defendant prays the court for an order dismissing the complaint herein and that it may go hence without day and with its costs herein expended.

(S.) Sol Goodman, Attorney for International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW CIO, Local 392.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 15, 1945

First Defense

Defendant, The Trailmobile Company, for answer to the complaint filed herein, admits the allegations of the following numbered paragraphs, No. I, II, III, IV, V, paragraph 1 of VII.

This defendant denies the allegations of paragraph VI, paragraph two of VII, VIII. Defendant denies each and every allegation in the complaint contained not herein expressly admitted to be true.

[fol. 80] Second Defense

Defendant, The Trailmobile Company, re-incorporates, re-iterates, and re-alleges all of the allegations in the First Defense herein contained as if expressly rewritten herein.

Further answering, this defendant says that plaintiff was employed by the Highland Body Manufacturing Company on or about the 8th day of February, 1935, and continued such employment until October 23, 1942, when plaintiff then entered the military service of the United States; that on May 3, 1943, he was re-employed by the Highland Body Manufacturing Company after having been discharged from said United States military service, and was re-employed in the paint department, where he had previously worked. Thereafter, an election was ordered by the National Labor Relations Board pursuant to law and plaintiff was one of those employees permitted to vote in the election for collective bargaining representative pursuant to the National Labor Relations Act. By a majority vote of the employees so permitted to vote in the election, the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO, Local 392, was duly elected the collective bargaining representative for all of the employees, including this plaintiff.

During the year 1943 he, along with other employees, was moved from the Elmwood Place plant of the Highland Body Manufacturing Company to The Trailmobile plant in Oakley, Cincinnati, Ohio. However, he was continued on the payroll of the Highland Body Manufacturing Company until December 31, 1943. As of January 1, 1944, said

The Highland Body Manufacturing Company was legally dissolved and plaintiff was then employed by The Trail-
[fol. 81] mobile Company (then the Trailer Company of America) and thereafter he received his pay from said The Trailmobile Company.

No contract was made by this defendant with the employees through their collective bargaining agent with reference to the seniority status of former Highland Body Manufacturing Company employees until July, 1944, when, pursuant to a War Labor Board affirmance of an arbitration finding, the collective bargaining agency fixed the seniority rights of former Highland employees as of January 1, 1944, the date said Highland employees were transferred to the pay-roll of the Trailmobile Company.

This defendant denies that plaintiff had any seniority rights with The Trailmobile Company prior to January 1, 1944. This defendant further says that the matters herein disputed relative to the corporate identities of The Highland Body Manufacturing Company and the Trailmobile Company, and with reference to the seniority status of the employees of the former Highland Body Manufacturing Company have been finally adjudicated by the Supreme Court of Ohio in case No. 30392, on the docket of said court. In said suit, now finally determined by said The Supreme Court of the State of Ohio (October 15, 1945, Ohio Law Reporter 51), plaintiff therein filed said action on his own behalf and on behalf of 178 other employees similarly situated, one of whom was this plaintiff, although not specifically named therein. Said suit by Louis J. Hess was filed in the Court of Common Pleas, Hamilton County, Ohio, and was duly numbered A-88735, duly filed on July 17, 1944, while this plaintiff was employed by The Trailmobile Company. Although this plaintiff had full knowledge of said suit, he
[fol. 82] failed to enter any appearance or objection or denial of the issues therein involved.

Defendant further says that the issues therein adjudicated disposed of the issues herein involved, and said adjudication is binding upon the plaintiff herein and upon this court, and that the issues so determined by a court of last resort of the State of Ohio are res judicata to the issues herein involved.

Third Defense

Defendant, The Trailmobile Company, says that plaintiff returned to work after being discharged from the military service of the United States on May 3, 1943, and that this action was not filed in the United States District Court or any other court until September 18, 1945, more than one year after the re-employment of defendant herein, and that plaintiff has not been deprived of any rights granted by Section 308, Title 50, of the laws adopted by the Congress of the United States and published in the United States Code, Annotated, known as the Selective Service and Training Act as amended.

Fourth Defense

Defendant, The Trailmobile Company, further says that United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO, Local 392, was the duly elected and qualified bargaining agent for all of the employees of The Trailmobile Company, including this plaintiff, and was so certified by the National Labor Relations Board; that as a condition of employment plaintiff is required to be a member of United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO, Local 392, and that plaintiff is and was at the time of filing this complaint a member of said union; that said union in [fol. 83] July, 1944, and again in July, 1945, entered into contracts with this defendant, The Trailmobile Company, and that, pursuant to said contracts and the seniority rights granted therein and thereunder, this plaintiff was given seniority as of January 1, 1944. This defendant further says that matters of seniority for all of the employees were determined by the Union and its membership including this plaintiff, and that this defendant, by reason thereof, granted this plaintiff seniority as of January 1, 1944, and that this defendant had no alternative other than to act accordingly; that plaintiff, as a member of said Union representing all of the employees of said plant, has only such rights and remedies as are given him by the union and by virtue of his membership therein.

Wherefore, having fully answered, the defendant, The Trailmobile Company, prays that the complaint filed herein

be dismissed, and that it be ordered to go hence without day, and recover from plaintiff its costs herein expended.

Waite, Shindel & Bayless, Herbert Shaffer, Philip J. Schneider, Attorneys for Defendant, The Trailmobile Company.

Duly sworn to by Wade T. Childress. Jurat omitted in printing.

[fol. 84] Copy mailed to Sol Goodman, Counsel for Union; Byron Harlan, Counsel for Plaintiff.

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed December 18, 1945

FINDINGS OF FACT

The Highland Body Manufacturing Company and The Trailmobile Company were two corporations manufacturing the same commodities in two separate plants in different parts of Cincinnati, Ohio. The Highland Body Manufacturing Company was a wholly owned subsidiary of The Trailmobile Company and had the same executive officers. During 1943 the supplies, equipment and personnel of The Highland Body Manufacturing Company were transferred to the plant of The Trailmobile Company, and a plan of consolidation of the two companies was executed, whereby The Trailmobile Company took over the assets and going business of The Highland Manufacturing Company and agreed to assume, pay and carry out all obligations of The Highland Body Manufacturing Company. A bill of sale was executed from The Highland Body Manufacturing Com- [fol. 85] pany to The Trailmobile Company. The transaction was effective on January 1, 1944, and the employees of the Highland Body Manufacturing Company were then transferred to the payroll of The Trailmobile Company. On the last full year of independent operation, 1942, The Highland Body Manufacturing Company had roughly one hundred employees and produced commodities worth one and one-half million dollars, while The Trailmobile Company had one thousand employees and produced commodities worth twelve million dollars.

The employees of both companies, prior to the consolidation, were affiliated with the A. F. of L. A controversy arose as to the seniority rights of the employees of The Highland Body Manufacturing Company after the consolidation, which controversy was submitted to the national representatives of the American Federation of Labor, and by that body it was decided that all employees of both companies should rate seniority under the consolidation directly as of the date they had individually been employed by their respective companies. The employees of The Trailmobile Company then re-organized and united with the C. I. O. and elected a bargaining agent for all of the employees to negotiate a labor contract with The Trailmobile Company. This labor contract was negotiated about July 1, 1944, and fixed the seniority rights of The Highland Body Manufacturing Company employees, regardless of their date of employment, as of January 1, 1944. This bargaining agreement also provided that within one year all employees must necessarily become affiliated with the C. I. O. Union.

One Mr. Hess, a former employee of The Highland Body Manufacturing Company, for himself and the other former Highland employees, including this plaintiff by name, in-[fol. 86] stituted a suit in the state courts to enjoin the C. I. O. Union and The Trailmobile Company from carrying out the seniority provisions of the new employment agreement, so far as imposing the seniority date of January 1, 1944, upon the Highland employees is concerned. The basis of his claim was that under the National Labor Relations Act, an employment agreement whereby the employees' agent bartered away the established rights of a minority of the employees for the benefit of the majority, was prohibited. The Hess suit was determined in the Common Pleas Court adversely to the Highland employees. This decision was approved by the Circuit Court of Appeals, and on attempted certiorari to the Ohio Supreme Court, that court refused to review the case.

Lawrence Whirls entered the employment of The Highland Body Manufacturing Company in 1935. He entered the military service of the United States in 1942, and returned to his employment in May of 1943, as an employee of The Highland Body Manufacturing Company. His seniority, status and pay were not reduced by the Highland Body Manufacturing Company and were not affected until the negotiations of the working agreement in July of 1944.

At that time his seniority was reduced to the status of January 1, 1944, along with all other Highland Body Manufacturing Company employees.

Complying with the closed shop provision of the employment agreement, Whirls joined the U. A. W.-C. I. O. in June of 1945. His reduction in seniority occurred fourteen months after he returned to his employment.

Conclusions of Law

The Court's conclusions of law based upon the foregoing facts are as follows:

[fol. 87] 1. The case of Hess v. The Trailmobile Company does not control the issues in the case at bar. There was no provision in the National Labor Relations Act which was involved in the Hess case which attempted in any way to confer seniority rights of any employees. The Hess case was a class suit and was determinative of the law as applying to the facts which pertained to each member of the class involved. It did not determine Whirls' rights as a veteran under the Selective Training and Service Act for the reason that that act was neither pleaded nor mentioned in the judgment entry of said cause and also because a number of the Highland employees were not veterans.

2. The fact that the plaintiff is a member of the C. I. O.-U. A. W., Local 392, which organization selects the bargaining agent for the employees of The Trailmobile Company, does not preclude this plaintiff from applying to the courts to protect his individual rights in his relationships with his employer. Such membership could only affect the relationship of Whirls to his union and the rights and obligations growing out of that membership. It could not affect Whirls' rights against third parties, at least so far as to preclude him from appealing to the courts for what he conceived to be transgression of those rights.

3. The Court finds that The Trailmobile Company, as it now exists after the complete absorption of its former subsidiary, The Highland Body Manufacturing Company, is under the plan of consolidation obliged to carry out and fulfill all of the contracts and obligations of The Highland Body Manufacturing Company. The court further finds that the seniority status of plaintiff Whirls upon his return

to The Highland Body Manufacturing Company after [fol. 88] leaving military service, under the provisions of the Selective Training and Service Act, became a contractual right vested in Whirls against the Highland Body Manufacturing Company and therefore became a right which Whirls continued to hold against The Trailmobile Company after consolidation so long as Whirls was employed by The Trailmobile Company and the provisions of the Selective Training and Service Act continue in force as they are at the date of this decision.

4. The seniority rights of a returning veteran employee are fixed in that employee as of the date he entered the military service of the United States. His seniority rights accumulate during his military leave, his legally authorized furlough after discharge and his first year of reemployment. They continue to be fixed without loss under the existing Selective Training and Service Act so long as that act remains in its present form. The provision of Paragraph 8 (c), Section 308, of the Act that the reemployed veteran shall not be "discharged from such position without cause within one year of such restoration" is not a limitation upon the length of time that the returned veteran employee shall enjoy his pre-service seniority rights. It is merely a provision that in addition to the rights which his ordinary seniority give him he is entitled to employment during the first year even over those non-veteran employees who have seniority superior to that of the returned veteran. The Court finds that it was the intention of Congress that during the first year of the veteran's return to his employment he should be entitled to his former employment as long as his employer is in business and as long as such reemployment is not impossible or unreasonable, even though such reemployment involves the discharge of former civilian [fol. 89] employees who have seniority rights higher than that of the returned veteran. The court finds that this right, which might be called super-seniority, lasts for only one year's time and that after the year's time the veteran enjoys his pre-service seniority on a par with all other employees.

John H. Duffel, Judge, United States District Court.

In United States District Court

Judgment—Filed December 20, 1945

This cause coming on to be heard on the pleadings and the agreed statement of facts, together with the exhibits, the arguments and briefs of counsel;

On consideration whereof, the Court has heretofore found for the plaintiff and against the defendant, and further, that plaintiff is entitled to a restoration of his seniority status among the employees of The Trailmobile Company as such seniority status existed prior to his entry into the military service, and that, therefore, he is entitled to seniority as of date of hiring with The Highland Body Manufacturing Company, to wit: February 8, 1935.

It Is Therefore Ordered that The Trailmobile Company reinstate the seniority of plaintiff as of February 8, 1935, and cancel the present seniority status as of January 1, 1944, to all of which counsel for defendant excepts. Defendants to pay costs.

John H. Druffel, Judge, United States District Court.

[fol. 90] (S.) Byron B. Harlan, U. S. Attorney, Attorney for Plaintiff; (S.) Waite, Schindel & Bayless, Philip J. Schneider, Waite, Schindel & Bayless, Attorney for Defendant; Sol Goodman, Attorney for U. A. W.-C. I. O., Local 392.

In United States District Court

Notice of Appeal of Defendant, U. A. W.-C. I. O.—Filed January 12, 1946

The defendant, International Union, United Automobile, Aircraft, Agricultural Implement Workers of America, U. A. W.-C. I. O., Local 390, hereby give notice of appeal to the Circuit Court of Appeals for the Sixth Circuit from a decision and judgment of the United States District Court entered in the within case on December 20th, 1945 wherein the court entered judgment for the plaintiff.

Sol Goodman, Attorney for Defendant, International Union, United Automobile, Aircraft, Agricultural Implement Workers of America, U. A. W.-C. I. O.

[fol. 91] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL BY DEFENDANT, THE TRAILMOBILE COMPANY—Filed January 17, 1946

The defendant, The Trailmobile Company, hereby gives its Notice of Appeal to the Circuit Court of Appeals for the Sixth Circuit from a decision and judgment of the United States District Court, entered in the within case on December 20, 1945, wherein the Court entered judgment for the plaintiff.

Waite, Shindel & Bayless, Herbert Shaffer, Philip J. Schneider, Attorneys for Defendant, The Trailmobile Company.

Copy of the above notice served on U. S. District Attorney, Counsel for Plaintiff, this 17th day of January, 1946.

Copy of the above notice served on Counsel for International Union, United Automobile, Aircraft, Agricultural Workers of America, UAW-CIO, Local 390, this 17th day of January, 1946.

Copies this 17th day of January, 1946, were served by the undersigned attorney, upon attorney for International Union and upon the U. S. Attorney.

Edw. L. Douglass, Jr.

[fol. 92] IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD—Filed January 25, 1946

It is stipulated by and between the parties that, pursuant to Rule 15(5) of this Court the parties file this as the designation of the record herein to be contained in the printed record.

1. The Transcript of the Testimony.
2. Government's Exhibit A, Plan of Liquidation.
3. Government's Exhibit B, Bill of Sale.
4. Government's Exhibit C, Union Contract, 1940-1942, Articles XIII, XIV, and XVIII, Section 2-a.
5. Government's Exhibit D, Union Contract, 1945, Article II, Section 1, Articles VIII, IX.
6. Defendant, The Trailmobile Company's Exhibit No. 1, Petition in Hess v. The Trailer Company of America.

7. Defendant, The Trailmobile Company's Exhibit No. 2, Answer of The Trailer Company of America in Hess v. The Trailer Company of America.

8. Defendant, The Trailmobile Company's, Exhibit No. 3, Answer of UAW-CIO in Hess v. The Trailer Company of America.

9. Defendant, The Trailmobile Company's, Exhibit No. 4, Memorandum Opinion in Hess v. The Trailer Company of America published in 31 O. O. 566, also in Volume 31, O. L. R. 566, December 10, 1945 issue. (Opinion not to be printed in record.)

10. Defendant, The Trailmobile Company's, Exhibit No. 5, The Judgment Entry in Hess v. The Trailer Company of America.

11. Defendant, The Trailmobile Company's, Exhibit No. 6, Decree and Entry of Affirmance.

[fol. 93] 12. Defendant, The Trailmobile Company's, Exhibit No. 7, Supreme Court Decision overruling motion to certify record in Hess v. The Trailer Company of America, reported in Volume 31, O. L. R., page 51, October 15, 1945, issue. (Page of Ohio Law Reporter not to be printed in record.)

Pleadings

13. Complaint.
14. Intervening Petition of UAW-CIO.
15. Answer of The Trailmobile Company.
16. Findings of Fact and Conclusions of Law.
17. Judgment Entry.
18. Notice of Appeal of UAW-CIO.
19. Notice of Appeal of The Trailmobile Company.
20. Designation of Record.

Waite, Shindel & Bayless, Herbert Shaffer, Philip J. Schneider, Attorneys for The Trailmobile Company; Sol Goodman, Attorney for UAW-CIO; Byron B. Harlan, United States District Attorney; by Frederic W. Johnson, Assistant U. S. District Attorney.

[fol. 94] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED—February 12, 1946

(Before Simons, Martin and Miller, JJ.)

This cause is argued by Philip J. Schneider for The Trailmobile Company; by Sol Goodman for the C. I. O., and by Byron B. Harlan for Whirls, and is submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

JUDGMENT—Entered April 5, 1946

Appeal from the District Court of the United States for the Southern District of Ohio

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 95] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 10189

THE TRAILMOBILE COMPANY, et al., Appellants,

v.

LAWRENCE WHIRLS, Appellee

Appeal from the United States District Court for the Southern District of Ohio

OPINION—Filed April 5, 1946

Before Simons, Martin and Miller, Circuit Judges

MARTIN, Circuit Judge:

Decision of this case requires interpretation of the re-employment provisions of the Selective Training and Service Act of 1940: 54 Stat. 855, U. S. C. A., Title 50, Sec. 301,

et seq., and especially Sec. 308 thereof, as amended. The Act provides that the honorably discharged service man, who, in order to perform training and service by induction into the land or naval forces of the United States, left a permanent position with a private employer, shall, if still qualified to perform the duties of the position, upon making the required application for reemployment after his relief from training and service, be restored to such position "or to a position of like seniority, status, and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." U. S. C. A. Title 50, App. 308(a)(b)B.

The Act further provides in Section 308(c) of the same Title: "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of [fol. 96] absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration."

The issue squarely presented to us is whether, in the circumstances of this case, the mandate of the statute that a veteran shall be restored to his former job *without loss of seniority* permits a labor-union collective bargaining agreement to whittle down his existing seniority at the time of his induction into the armed forces, in consequence of the further mandate of the statute that he shall not be *discharged without cause* within one year from the date of his reemployment.

Lawrence Whirls was employed by the Highland Body Manufacturing Company on February 8, 1935, and continued to be an employee of that corporation until he entered the military service of the United States on October 23, 1942. When he was inducted into the armed forces, Whirls was working under an employment contract by which seniority was to be determined from the last date of hiring and to be upon a departmental basis. The contract had been made with the company by the collective bargaining agent of all its employees.

Upon his honorable discharge from the armed forces of the United States, Whirls was reemployed by the Highland Company on May 3, 1943, in his former capacity in the Painting Department. The Highland Body Manufacturing Company was the wholly owned subsidiary of another corporation, The Trailmobile Company. Both corporations manufactured the same commodities in separate plants, in Cincinnati, Ohio, and had the same executive officers. The employees of Highland numbered approximately 100, while Trailmobile had 1000 employees. The commodity production of Highland totalled about $1,500,000; that of Trailmobile approximated $12,000,000.

After the reemployment of Whirls, a plan of liquidation of the Highland corporation was put into effect at the close of business on December 31, 1943. By that plan, Highland transferred and conveyed to The Trailmobile Company [1] [fol. 97] all its property and assets and its goodwill as a going concern; and Trailmobile assumed all the liabilities and obligations of Highland and undertook the performance of its outstanding contracts. Upon the effective date of the consolidation or merger, January 1, 1944, the employees of the Highland Body Manufacturing Company were transferred to the service and payroll of The Trailmobile Company.

Prior to the consolidation, the employees of both companies had been affiliated with the American Federation of Labor. As found by the district court, that organization ruled that all employees of both companies should, after the consolidation, rate seniority as of the date each had individually been employed by the respective companies. But, after the consolidation, the employees of The Trail-

[1] The actual conveyances were made to the Trailer Company of America, but in the pleadings and in the recorded procedure in the court below that company has been treated as if identical with The Trailmobile Company. We presume that the identity results from a charter amendment changing the corporate name; but this does not affirmatively appear in the record. However that may be, all parties to this controversy have presented the case and the district judge has ruled and written as if The Trailer Company of America and the appellant Trailmobile Company are identical; so, on this appeal, we have so considered them.

mobile Company selected the C. I. O. as its collective bargaining agent to negotiate an employment agreement with Trailmobile for all its employees. This collective bargaining agreement, negotiated by C. I. O. with The Trailmobile Company, was consummated and evidenced in writing sometime between the latter part of June and the middle of July, 1944.[2]

Admittedly, this labor contract fixed the seniority rights of the former employees of Highland as commenced on January 1, 1944, regardless of the actual date of employment of each individual. Thus, Whirl's seniority, dating from his original employment by Highland on February 8, 1935, was cut off and his seniority reduced to commence as of January 1, 1944. This vital reduction in his well advanced seniority status was made, notwithstanding lip service given fair treatment of the veteran in the following clause found in the C. I. O. bargaining agreement: "Employees entering a military, naval or other combat service, or conscripted by the United States in time of war will be considered on a leave of absence and will maintain and accumulate all seniority rights without interruption."

Represented by the United States Attorney, Whirl filed on September 18, 1945, in the United States District Court for the Southern District of Ohio a civil action against The Trailmobile Company. His complaint declared that, in violation of his lawful seniority status, he has been transferred from his position in the Painting Department, in which he had the highest seniority, to the Stock Depart- [fol. 98] ment of The Trailmobile Company where his pay is less; and that he has been deprived of his statutory rights to seniority as granted by Congress in the Selective Training and Service Act. Averring that he has been irreparably damaged and has no adequate remedy at law, he prayed a mandatory injunction directing his reinstatement by the defendant to his former position in its Painting

[2] The record does not disclose the exact date of this collective bargaining agreement, as only excerpts from the contract are included in the record and the date of the execution of the exhibit is not shown. The briefs and the pleadings are not consistent as to the dates, which, of course, causes confusion, but the confusion relates to immaterial matter.

Department and the restoration of his seniority to the date of his original employment, February 8, 1935.

After hearing the cause upon the oral stipulations of counsel and upon the exhibits introduced in evidence, the district court filed findings of fact and conclusions of law; and entered judgment that Whirls "is entitled to a restoration of his seniority status among the employees of The Trailmobile Company as such seniority status existed prior to his entry into the military service, and that, therefore, he is entitled to seniority as of date of hiring with The Highland Body Manufacturing Company, to wit: February 8, 1935." The Judgment entered directed that The Trailmobile Company reinstate the seniority of Whirls as of February 8, 1935, and cancel his present seniority status as of January 1, 1944. From this judgment appeals have been vigorously pressed by The Trailmobile Company, and the International Union, United Automobile, Aircraft, — Agricultural Implement Workers of America, U. A. W.-C. I. O., Local 390, which became a party defendant in the district court by filing an intervening petition and participating in the proceedings there.

The appellant company insists that the legislative history of the Selective Training and Service Act does not justify the conclusion that Congress intended "to upset the established labor relations on the production front by requiring that labor contracts be construed to include provisions for placing returned World War II veterans in a position at the head of the seniority list." The veteran Whirls is not asking to be placed in a position at the head of the seniority list. He is merely complaining that, in consequence of a collective bargaining agreement between his employer and a labor union which he has been forced to join in order to retain his job, he has been unjustly and unlawfully deprived of his seniority status as it existed *at the time he was inducted into the armed forces.*

It is a matter of common knowledge that there was much opposition to the original Selective Training and Service Act. Its existence was prolonged by Act of Congress by [fol. 99] the slim margin of one vote in the House of Representatives. Concurrently with its enactment and reenactment—and perhaps essentially so—there was held forth to the young men who were to be inducted into military service the strongest assurance that the *status quo* of their

employee relationships would be preserved as securely as was reasonably possible.

There can be no reasonable doubt that in the mind and heart of the Congress the provisions of Section 308(c) of the Act were designed and felt to be benevolent and avuncular to the young men compulsorily chosen for military training and service in time of national need. The Act expressly declared that it was imperative to increase and train the personnel of the armed forces of the United States; and that the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selection.

The Act was passed by Congress and approved by the President with full knowledge of the existence of the National Labor Relations Act. That Act was not amended; but surely it should not be presumed that Congress, in failing to amend the Wagner Act, intended to permit the concerted action of a collective bargaining agency and an employer to destroy or whittle down the statutory right of the returning soldier, sailor, airman and marine to restoration to seniority security in his job granted by the Selective Training and Service Act.

The right to collective bargaining and all the privileges conferred by the Wagner Act upon noncombatant workers may be well preserved by just recognition in their collective bargaining agreements of the fair intendment of the Selective Training and Service Act that those who went to war must be protected in their then-existing seniority positions as long as the Act remains in effect. If this principle is accepted, there need be no industrial strife between those who worked and fought and those who worked but did not fight—which counsel for the Union and for the Company so gloomily predict. In our view, the language of the pertinent section of the Selective Training and Service Act, in its context, impels acceptance of this principle.

Reading together Section 308(b)B and Section 308(c), the mandate of the statute is plain that the veteran shall be restored by his private employer to a position of like seniority, status, and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; and the person so restored to such position [fol. 180] shall be considered as having been on furlough or leave of absence during his period of military service

and shall be so restored *without loss of seniority*. As we construe this language, it does not lie within the power of the employer to join with a collective bargaining agency, chosen by the majority of its employees acting in pursuance of the provisions of the Wagner Act, in defeating the purpose and express language of the statute by bargaining away the seniority status of the veteran as it existed at the time of his induction into the armed forces.

The right of the veteran to be restored to his former position without loss of seniority is an independent and additional right, not to be impaired by the other protective benefits accorded him by the statute. His right to participation in insurance or other benefits offered by the employer, pursuant to established rules and practices relating to employees on furlough or leave of absence in effect at the time the veteran was ordered into military service, is *a separate and additional benefit*. Likewise, the last provision in paragraph (c), that the veteran "shall not be discharged from such position without cause within one year after such restoration," is a *separate, distinct and independent benefit* and should not be construed as limiting to one year the restoration of the veteran to his former position without loss of seniority. While he may not be discharged without cause within one year, if he is not so discharged he retains his seniority status as long as the Selective Training and Service Act in its present phraseology remains in effect. Collective bargaining agreements entered into pursuant to the terms of the Wagner Act must recognize the statutory right of the veteran to the seniority granted him by the selective service statute; and any such agreement which deprives him of that right is invalid to that extent.

In *Market Company* v. *Hoffman*, 101 U. S. 112, 115, the Supreme Court asserted that a court is not at liberty to construe any statute so as to deny effect to any part of its language; and that it is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. See also *Ex Parte The Public National Bank of New York*, 278 U. S. 101, 104; *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208; *McDonald* v. *Thompson*, 305 U. S. 263, 266.

Nothing said in *Crooks* v. *Harrelson*, 282 U. S. 55, 59, 60, cited by appellants, gainsays the correctness of our construction of the statute in controversy. We are not

here rejecting, but are carrying into effect what we construe to be the literal meaning of the statute.

[fol. 101] To ignore the plainly expressed intention of the Congress that the veteran should be restored to his position without loss of seniority would be to adopt an unreasonable and unwarranted construction that the clause of the statute protecting the veteran against discharge without cause within one year after his return to his position nullifies the statutory guarantee of the preservation of his seniority status contained in a preceding clause.

This court very recently expressed the opinion that an employee's right to seniority employment status may stem from a statute. In *Elder* v. *New York Cent. R. R. Co.*, 152 F. (2d) 361, 364 (C. C. A 6), we said: "The seniority right of the man who toils, indoors or out, in a shop or in an office, is a most valuable economic security, of which he may not be unlawfully deprived The right, however, is not inherent. *It must stem either from a statute* or a lawful administrative regulation made pursuant thereto, or from a contract between employer and employee, or from a collective bargaining agreement between employees and their employer. *In the absence of statute*, mere employment independent of the contractual conferring of special benefits upon those who have longest service records with the individual employer, creates no rights of seniority in retention in service or in reemployment. *In the instant case, the appellant rests upon no right created by statute*, but solely upon a collective bargaining agreement, made between the chosen representative of the workers and the employer." (Italics supplied.)

In the present controversy, Whirls holds a position diametrically opposite that of Elder. Whirls rests upon a right created by a Federal statute.

Appellants stress a recent district court opinion, *Olin Industries, Inc.* v. *Barnett* (S. D. Ill.; January 24, 1946), where Judge Briggle held that the employer need not advance the veteran beyond the seniority status which he would have attained had he not entered military service, but had remained on his job. The employee whom he would replace, if so advanced, had held a supervisory position over the veteran at the time he was inducted into service. The case is broadly distinguishable on its facts from the case at bar.

Since the argument and submission of this case, the Second Circuit Court of Appeals, in a two-to-one decision promulgated March 4, 1946, in *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, —— F. (2d) —— (C. C. A. 2), held that a veteran who had been restored to his former position as required by the Selective Training and Service Act [fol. 102] was properly laid off by his employer during the first year following his restoration on occasions when there was insufficient work for all the employees and the employer preferred non-veterans who had higher shop seniority than the veteran in consequence of an agreement between the employer and a labor union. The decision in the *Fishgold* case relates to a veteran's rights under the selective service statute during the first year of his reemployment. In this respect, the case is dissimilar from that at bar. We are frank to state, with highest deference, that we are not in general accord with the views expressed by Judge Hand for the majority of his court. However, we are in hearty accord with his broad-minded admonition: "The fact that we are ourselves not agreed cautions us that we should not be too sure of our conclusion; and obviously the really important matter is that the question should reach the Supreme Court as soon as possible."

Cognizance should be taken of the appropriately liberal interpretation of the returning veteran's rights to reemployment, assured by the Selective Training and Service Act, as evidenced by the opinion of Judge McLaughlin announced February 26, 1946, in *Grasso* v. *Crowhurst*, —— F. (2d) —— (C. C. A. 3). See also *Kay* v. *General Cable Corporation*, 144 F. (2d) 653 (C. C. A. 3).

We find no merit in the argument of appellants that the rights of the appellee Whirls to his seniority status are not protected by the Selective Training and Service Act, for the reason that the Highland Body Manufacturing Company, after conveying its property and assets to the appellant Trailmobile Company, surrendered its corporate existence. The contention is that Whirls became a new employee of the appellant Trailmobile Company. As found by the district court, the appellant company, as it now exists after the complete absorption of its former subsidiary corporation, is, under the plan of consolidation, obliged to carry out and fulfill all the contracts and obligations of its subsidiary. The seniority status of Whirls guaranteed by the statute was equally binding upon the

Trailmobile Company as upon the Highland Company. The two companies must be treated as identical, insofar as the statutory rights of the veteran are concerned.

For analogous cases of corporate identity, as declared and dealt with under the Fair Labor Standards Act, see *National Labor Relations Board* v. *Federal Engineering Company, et al.*, —— F. (2d) —— (C. C. A. 6), decided February 6, 1946; *National Labor Relations Board* v. *Swift* [fol. 103] *& Co.*, 127 F. (2d) 30, 32 (C. C. A. 6); *National Labor Relations Board* v. *Condenser Corp.*, 128 F. (2d) 67, 71, 72 (C. C. A. 3); *National Labor Relations Board* v. *Aluminum Products Co.*, 120 F. (2d) 567, 569 (C. C. A. 7); *National Labor Relations Board* v. *Adel Clay Products Co.*, 134 F. (2d) 342, 346 (C. C. A. 8).

Schenley Distillers Corporation v. *United States, et al.*, —— U. S. ——, decided January 2, 1946, does not support the position of appellants. In its opinion in that case the Supreme Court stated: "The fact that several corporations are used in carrying on one business does not relieve them of their several statutory obligations more than it relieves them of the taxes severally laid upon them."

Appellants contend that the rights which appellee seeks to have determined in this civil action in the federal court have been finally adjudicated against him by the Ohio state courts in *Hess* v. *Trailer Company of America*, 31 O. L. R. 51 (Oct. 15, 1945); 31 O. L. R. 566 (Dec. 10, 1945). It is insisted that the adjudication in the Hess case is binding upon this court under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64. The argument is fallacious. Decision in the instant controversy is governed by an Act of Congress. The subject matter before us does not pertain to general common law. The interpretation by the state court of the rights of a citizen under a federal statute is not binding upon the federal courts.

There is another ground for rejecting appellants' argument. Identity or community of interest of the parties in whose behalf a class action is brought is essential to its maintenance. In *Hansberry* v. *Lee*, 311 U. S. 32, 45, the Chief Justice sketches the evolution of the class suit as an invention of equity; states the supporting reasons for its recognition; and points out that the selection of representatives for purposes of litigation "whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford

that protection to absent parties which due process requires." An interesting and instructive annotation to the opinion of the Chief Justice appears in 132 American Law Reports, Annotated, 749, et seq.

A most scholarly and elucidating opinion upon class actions will be found in *Weeks* v. *Bareco Oil Co.*, 125 F. (2d) 84, 92. Judge Evans reviews and discusses the authorities. He quotes with approval the following statement in *Waybright* v. *Columbian Mutual Life Ins. Co.*, 30 F. Supp. 885, 888 (W. D. Tenn.), in which the pertinent [fol. 104] authorities pertaining to class suits had also been reviewed: "So, it seems settled law that a small minority of numerous interested parties may maintain a class suit in behalf of themselves and others, *similarly situated for an object common to them all.*" (Italics supplied.) The decree in the *Waybright* case was affirmed on appeal to this court: 122 F. (2d) 245 (C. C. A. 6).

For other illustrative authorities asserting the necessity for identity of interest in class actions, see *Redmond* v. *Commerce Trust Co.*, 144 F. (2d) 140, 151 (C. C. A. 8); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F. (2d) 261, 264 (C. C. A. 8); *Atwood* v. *National Bank of Lima*, 115 F. (2d) 861, 863 (C. C. A. 6).

The *Hess* case was not an appropriate class action in which the judgment entered could be binding upon Whirls, inasmuch as he was not similarly situated with all the parties in whose behalf the class action was instituted in the state court by Hess against the Trailer Company of America. The rights of the members of the class in whose behalf Hess brought the suit were not identical. Some were men who had been inducted into the armed forces under the Selective Training and Service Act; the majority were not. Hess brought the suit against the corporate employer on his own behalf and on behalf of 178 other employees, nominally including the appellee Whirls. He averred in his petition that the employees were "similarly situated"; but asserted that 104 of them were "actually working" for the defendant company and that 74 of the total number were employees of the defendant company who, at the time of the filing of the suit, were "in the armed forces and services of this Country."

The judgment entered in the Court of Common Pleas of Ohio, affirmed by the Court of Appeals for Hamilton County, Ohio, declared, *inter alia*, that "the defendant

Union treating the employees of Highland Body Manufacturing Company as new employees of the Trailer Company of America as of January 1st, 1944, acted within their lawful rights in determining that the dissolution of the Highland Body Manufacturing Company terminated the employment of plaintiff and those on whose behalf this action is brought."

This declaratory judgment of the state court is not binding upon this court. If recognized here, the judgment of the Ohio courts would nullify the right of the appellee Whirls to his seniority status as an employee of the appellant company as of February 8, 1935. His seniority status as of that date is, as we have shown, guaranteed by the [fol. 105] Selective Training and Service Act as long as the Act remains in effect and as long as Whirls remains in the service of the appellant company.

The judgment of the district court is affirmed.

[fol. 106] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 107] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 10, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

date of hiring and to be upon a departmental basis. Whirls's seniority dated from February 8, 1935, when he was employed.

Upon his honorable discharge from the armed forces, Whirls was reemployed on May 3, 1943, and was "restored" to his former position, with the identical seniority rights dating from February 8, 1935, which seniority rights he held for a period of more than one year from his reemployment. It is admitted that he was "so restored without loss of seniority."

Whirls continued in this position with the Company, without any change in his seniority status until the summer of 1944, a period longer than "one year after such restoration." At that time, under a new labor union collective bargaining agreement, Whirls's seniority, dating from his original employment on February 8, 1935, was changed and his seniority reduced to commence as of January 1, 1944. Thus more than a year after he had been "so restored without loss of seniority," Whirls's seniority status was reduced below the seniority status which existed at the time of his induction into the armed forces. It is immaterial, we submit, to the legal question involved, as to the reasons for this reduction in his seniority status in the process of collective bargaining, but briefly it resulted from a transfer of the affiliation of the employees from an AFL union to a CIO union, following the Trailmobile Company's (parent corporation's) purchase of the assets of its subsidiary corporation and the merging of the operations of the two separate plants. Whirls had been an employee of the subsidiary. On January 1, 1944, he became an employee of the parent corporation, and has remained in its employment.

The issue presented is whether the Selective Training and Service Act prohibits such "loss of Seniority" after

the expiration of "one year after such restoration" to his former position.

It is stipulated that Whirls was "so restored without loss of seniority" on May 3, 1943, and that there was no reduction of the status quo of his seniority status (as it existed at the time he was inducted into the armed forces) until more than "one year after such restoration."

We submit that the Circuit Court of Appeals erred in construing the words of the Act "without loss of seniority" to guarantee the seniority status of Whirls as it existed at the time he was inducted into the armed forces, "as long as the Act remains in effect and as long as Whirls remains in the service of the appellant company."

Section 308(b) (B) of the Act provides that the employer "shall restore such person (veteran) to such position or to a position of like seniority," and Section 308(c) provides that "Any person who is restored to a position shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority," etc.

The words "without loss of seniority" are preceded by the words "so restored," and qualify and limit the application of the words "without loss of seniority" to the time implied in the words "so restored." There is no express provision in the Act fixing any seniority rights of the returning veteran, after such restoration, as of any later definite or determinable date, or so long as the Act remains in effect, or so long as the returning veteran remains in the service of his employer. There is nothing in the Act which necessarily or reasonably intends or implies such broad, indefinite and comprehensive periods of time, after the restoration to his position.

Without the Act an employee leaving the employment of the employer for any reason, including joining the armed

forces of the United States, would have lost his job and his seniority status. Upon discharge from the armed forces, he would have been a new employee of the Company with seniority as of that date of hiring. The Act, we submit, was passed to prevent such a result. The Act does not in words nor by implication guarantee seniority for any period of time, but provides that the employee shal be restored by the employer without loss of seniority and "shall not be discharged from such position without cause within one year after such restoration." There being no guarantee of employment longer than one year, there could not therefore be a continuing guarantee of seniority for a period longer than that one year. Thereafter, such employee's rights of employment are protected by the National Labor Relations Act and collective bargaining rights thereunder.

Respondent prayed for a mandatory injunction directing the petitioner, The Trailmobile Company, to restore his seniority to the date of his original employment with the subsidiary, to-wit: February 8, 1935.

The issues were tried before Judge John H. Druffel in December 1945. He rendered a Findings of Fact and Conclusions of Law on December 18, 1945, and Judgment Entry was entered thereon December 20, 1945, finding the issues in favor of respondent and ordering respondent restored to his seniority status as it existed prior to his entry into the military service.

The judgment was appealed to the United States Circuit Court of Appeals for the Sixth Circuit where it was argued on February 12, 1946, and a decision was rendered April 5, 1946, affirming the judgment.

Specifications of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that § 8 (b) and (c) of the Selective Training and Service Act of 1940 entitled respondent to seniority

as it existed at the time he was inducted into the armed forces, "as long as the Act remains in effect and as long as Waris remained in the service of the appellant company."

2. In holding that appellants did not have the right to bargain collectively under the National Labor Relations Act after the completion of one year's reemployment and thereby change his (and all others similarly situated) seniority status.

Reasons for Granting the Writ

No other appellate court has decided the question at issue in this case. The issues herein do not directly raise the super-seniority question presented in *Fishgold* v. *Sullivan Drydock*, No. 970 on the docket of this court. The question raised here is more far-reaching than the super-seniority question raised in the *Fishgold* case, because it determines that a veteran's seniority is fixed as of date of entry into the service and cannot thereafter be changed through collective bargaining *as long as the Act remains in effect and the employee continues in employment with the employer.*

Judge Martin in writing the opinion below, had this to say:

> "The decision in the Fishgold case relates to a veteran's rights under the Selective Service Act during the first year of his reemployment. In this respect, the case is dissimilar to that at bar. We are frank to state, with highest deference, that we are not in general accord with the views expressed by Judge Hand for the majority of his court. *However, we are in hearty accord* with his broad-minded admonition: 'The fact that we are ourselves not agreed cautions us that we should not be too sure of our conclusion; and obviously the really important matter is that the question should reach the Supreme Court as soon as possible.'" (Italics supplied.)